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Supreme Court, U.S.
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Supreme Court of the United States

JOHN CASCIANI,

Petitioner,

- v. -

RONALD NESBITT, TOWN BOARD SUPERVISOR,
In His Individual and Official Capacity,
TOWN OF WEBSTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Engquist v. Oregon Dep't of Agriculture*,[1] the Court held that a class-of-one claim alleging discrimination for vindictive, irrational purposes is not a valid legal claim in the context of public employment, and that non-discretionary state action was an element that the plaintiff would need to allege in that context. That portion of *Engquist* has now been vigorously applied outside the public employment context, including, *inter alia*, municipal land use cases,[2] probation decisions,[3] public contracting,[4] and police investigations,[5] to require *Village of Willowbrook v. Olech*[6]-type plaintiffs to establish non-discretionary state action in non-public employment class-of-one claims. The Second Circuit joined those courts that have applied *Engquist* to bar certain class of one claims in connection with discretionary decisions made outside the public employment context, creating a circuit split that needs resolution by the Court.

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1. 533 U.S. 591, 128 S.Ct. 2146 (2008)

2. *Casciani v. Nesbitt*, 659 F. Supp. 2d 427 (2009).

3. *United States v. Moore*, 543 F.3d 891, 900-01 (7th Cir. 2008).

4. *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008); *Pignanelli v. Pueblo Sch. Dis. No. 60*, 540 F.3d 1213, 1222 (10th Cir. 2008).

5. *Flowers v. City of Minneapolis*, 558 F.3d 794, 799-800 (8th Cir. 2009).

6. 528 U.S. 562, 120 S.Ct. 1073, 145 L Ed 2d 1060 (2000).

Questions Presented:

1. Whether, outside the public employment context, an *Olech*-type plaintiff must establish that the differential treatment received resulted from the additional *Engquist* element of non-discretionary state action?

2. Whether "subjective ill will" is required in order to state a valid class-of-one equal protection claim?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	viii
TABLE OF CITED AUTHORITIES	ix
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
A. The Facts	2
1. Introduction	2
2. The Town's Disdain for Italian Americans	3
3. Town Official's Dislike of Casciani Because He is Italian-American	4
4. Casciani Obtains a Commercial Pilot License and an Enstrom Helicopter	5

Contents

		Page
5.	The Enstrom 480/480B Turbine Powered Helicopter	5
6.	The Town Had No Law Prohibiting Private Airports	6
7.	Casciani Immediately Subject to Harassment by the Town	7
8.	Casciani Obtains FAA Approval on October 26th, 2004	8
9.	Town Officials Demand Casciani "Make it Legal"	8
10.	Casciani Seeks Guidelines on Private Airport Establishment	9
11.	January 27th, 2005 Town Board Meeting	10
12.	The Town Requests Casciani "Withdraw" His Application	11
13.	The Real Reason Why the Town Asked Casciani to Withdraw His Application	12
14.	Commissioner of Public Works Takes Sound Measurements of the Helicopter	13

Contents

Page

15. Joe Oster & Supervisor Thomas' Conspire to "Zone Out" Casciani ... 13

16. Oster's February 17th, 2005 Letter & CD Presented to the Webster Town Board 14

17. February 17th, 2005 Town Board Meeting 16

18. Zoning Law Committee 16

19. April 21st, 2005 E-Mail to the NYSDOT from the Town 17

20. April 21st, 2005 Town Board Meeting: Moratorium 17

21. February 2nd, 2006 Town Board Meeting 18

22. March 2nd, 2006 Town Board Meeting . 19

23. Resolution No. 115 20

24. The New Law "Carving" Out 1 Manned Ultra Lights 20

25. Similarly Situated Aircraft Owners Still Permitted to Take Off and Land in Webster 23

TABLE OF APPENDICES

Page

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 1a

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK, DATED OCTOBER 6, 2009 ..... 7a

APPENDIX C — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 22, 2010 94

TABLE OF CITED AUTHORITIES

Page

Cases

Allegheny Pittsburgh Coal Co. v. Commission of Webster City,
488 U.S. 336 (1989) 33

Analytical Diagnostic Labs, Inc. v. Kusel,
2010 U.S. App. LEXIS 20422 (2d Cir. 2010) ... 34

Assoko v. City of New York,
539 F. Supp. 2d 728 (S.D.N.Y. 2008) 39

Bell v. Duperrault,
367 F.3d 703 (7th Cir. 2004) 40

Bizzaro v. Miranda,
394 F.3d 82 (2d Cir. 2005) 39

Boone v. Spurgess,
385 F.3d 923 (6th Cir. 2004) 39

Casciani v. Nesbitt,
659 F. Supp. 2d 427 (2009) .....i, 1, 34

Collichio v. Town of Webster,
01-cv-6265 3

Crippen v. Town of Hempstead,
No. 07-cv-3478, 2009 WL 803117
(E.D.N.Y. March 25, 2009) 33-34

Page

Douglas Asphalt Co. v. Qore, Inc.,
541 F.3d 1269 (11th Cir. 2008) ..... i, 34

Engquist v. Oregon Dep't of Agriculture,
533 U.S. 591, 128 S.Ct. 2146 (2008) ..... *passim*

Esmail v. Macrane,
53 F.3d 176 (7th Cir. 1995) 34

Flowers v. City of Minneapolis,
558 F.3d 794 (8th Cir. 2009) ..... i, 34

Harlen Associates v. Village of Mineola,
273 F.3d 494 (2d Cir. 2001) 39

LaTrieste Rest. & Caberet v. Village of Port Chester,
40 F.3d 587 (2d Cir. 1994) 39

Lisa's Party City v. Town of Henrietta,
185 F.3d 12 (2d Cir. 1999) 39

Marino v. Shoreham Wading River Central School Dist.,
No. 08-cv-0825, 2008 WL 5068639
(E.D.N.Y. Nov. 20, 2008) 34

McClendon v. City of Columbia,
305 F.3d 314 (5th Cir. 2002) 39

Cited Authorities

Page

McFarland v American Sugar Co.,
241 U.S. 79 (1916) 36

MIMICS, Inc. v. Village of Angel Fire,
394 F.3d 836 (10th Cir. 2005) 39

Pignanelli v. Pueblo Sch. Dis. No. 60,
540 F.3d 1213 (10th Cir. 2008) ..... i, 34

Racine Charter One, Inc. v. Racine Unified Sch. Dist.,
424 F.3d 677 (7th Cir. 2005) 39

Seymour's Barnyard, Inc. v. Town of Huntington,
No. 08-cv-3248, 2009 WL 1514610
(S.D.N.Y. June 1, 2009) 33

Shipp v. McMahon,
234 F.3d 907 (5th Cir. 2000) 39

Siao-Pao v. Connolly,
564 F.Supp. 2d 232 (S.D.N.Y. 2008) 35

Sioux City Bridge Co. v. Dakota County,
260 U.S. 441 (1923) 33, 36

Sloup v. Loeffler,
No. 05-cv-1766 (JFB)(AKT), 2008 WL
3978208 (E.D.N.Y. Aug. 21, 2008) 35

Page

Snowden v. Hughes,
321 U.S. 1 (1944) 37

United States v. Moore,
543 F.3d 891 (7th Cir. 2008) ..... i, 34

Village of Willowbrook v. Olech,
528 U.S. 562, 120 S.Ct. 1073, 145 L. Ed. 2d
1060 (2000) ..... *passim*

Willets Point Indus. & Realty Ass'n v. City of New York,
No. 08-cv-1453 (ERK) (JO), 2009 WL
4282017 (E.D.N.Y. Nov. 25, 2009) 35

Yick Wo. v. Hopkins,
118 U.S. 356 (1886) 35, 36

Statutes and Other Authorities:

U.S. Constitution, Amend. XIV 2

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 1

New York General Business Law § 249 ..... *passim*

FAR 103.1 26

Cited Authorities

Page

FAR 103.1(a)(1) 26

FAR 103.15 (Operations Over Congested Areas) ... 25

Chapter 76 Airports and Heliports ..... *passim*

Chapter 76 Airports and Heliports § 76-5 18

Chapter 76 Airports and Heliports § 76-6 18

Chapter 76 Airports and Heliports § 76-8 19

Chapter 76 Airports and Heliports § 76-21 19

§ 76-12 Enforcement 21

Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One,"* 89 Ky. L.J. 69 (2000-2001) 40

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit is reported at 09-4170-cv. (App. at 1a-6a). The memorandum decision of the district court (App. at 7a-93a) is reported at *Casciani v. Nesbitt*, 659 F. Supp. 2d 427 (2009).

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals was issued September 7, 2010. This Court has jurisdiction over this petition under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action arises under 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Casciani's equal protection challenge is based on municipal land regulation. Casciani, a prominent Italian-American real estate developer and professional pilot, sought to land his helicopter on two sites located in the Town of Webster, New York, ("the Town"), a municipality that had no prior law regarding private aircraft operation. To that end, he sought and obtained FAA approval for each of the landing sites he proposed, and sought final approval from the Town under New York General Business Law § 249.

In reaction to Casciani's request, he was harassed by Town officials, delayed and denied final approval of

his landing sites, publicly humiliated at town board meetings, and, eventually, subject to the creation of a law targeted at him alone to prohibit him from ever using any of his property as a landing site while others similarly situated were allowed to land wherever they desired because, according to Town officials, "*that law applies to Casciani only.*"

Casciani's equal protection claim alleged that the Town's actions were "irrational and wholly arbitrary," and "motivated by ill will" resulting from Casciani's status as a prominent Italian-American, and his affiliation with Michael Collichio, ("Collichio"), another prominent Italian-American resident of the Town, who filed a previous, related, successful lawsuit against the Town on that very basis. *See Olech*, 528 U.S. 562, 120 S.Ct. 1073.

While the original purpose of the Fourteenth Amendment was not to prevent all differential treatment, but rather to prevent irrational and improper differential treatment, discriminatory motive has played a large role in Equal Protection litigation, a factor ignored by both the Second Circuit and the district court by the application of *Engquist* to the facts detailed below.

A. The Facts

1. Introduction

In or about 1996, Casciani purchased a large lot of land in the Town and began building exclusive homes in an area commonly referred to as the "Bluffs." Casciani also built his home in this development and moved into

his new home in or about August of 2002, along with several other affluent Italian Americans.

Casciani is a business associate and close personal friend of Collichio, another prominent Italian-American Town resident and real estate developer. Collichio also brought suit against the Town in the District Court for Western New York. In *Collichio v. Town of Webster*, 01-cv-6265, Collichio had contended that Town officials had violated his right to equal protection under the law by selectively enforcing the laws and rules of the Town of Webster due to the fact that Collichio is an Italian American as well.

2. The Town's Disdain for Italian Americans

Town officials have, historically, expressed their dislike for Italian-Americans by treating Italian-American business owners differently than non- Italian American business owners.

In *Collichio*, former Town Building Inspector gave testimony under oath confirming

Collichio's claim that he was subject to discrimination based on his Italian heritage. D'Amico also testified that Collichio was treated differently than any other business in the Town of Webster, in part, because he is an Italian-American. D' Amico also testified that in the zoning context, the Town of Webster was inconsistent at best.

The *Collichio* matter settled after District Court Judge Michael Telesca denied the Town's motion for summary judgment on the issue of whether the Town

violated Collichio's Equal Protection rights. Collichio feels that had he not filed his federal lawsuit against the Town that the harassment by Town officials would have continued.

Prior to Casciani filing his lawsuit in April of 2008, the Town was served with charges of discrimination filed with the Equal Employment Opportunity Commission ("EEOC") alleging, *inter alia*, that an Italian-American was not hired by the town due to his nationality and that Town officials refer to Italians as "dagos," "wops," *et cetera*.

3. Town Official's Dislike of Casciani Because He is Italian-American

Casciani too was the object of scorn and dislike by Town Officials because he is Italian, and associates with successful Italian-Americans who own property and successful businesses in the Town.

Casciani was disliked and singled out by then Town Board Supervisor Cathryn Thomas, ("Thomas"), and eventually by Nesbitt ("Nesbitt"), who would eventually replace Thomas as Town Supervisor in 2006.

Private individuals in the community also disliked Casciani due to the fact that he was an Italian-American. In particular, Joe Oster, ("Oster") a close friend of former Town Board Supervisor Thomas, and Casciani's next door neighbor, particularly disliked Casciani due to the fact that he was an Italian American.

Oster made his dislike for Italian-Americans known to Casciani. For example, Oster asked Casciani upon

completion of the Bluffs if he "had enough yet;" when Casciani asked what he meant, Oster asked him if he "had enough Italians [who purchased property in the Bluffs]." When Casciani asked why, Oster responded, "**because I don't like Italians...you'll see.**"

The dislike for Casciani by Oster, close friend of then Town Supervisor Thomas, was apparent to third parties.

4. Casciani Obtains a Commercial Pilot License and an Enstrom Helicopter

In or about the end of 2002, Casciani obtained a commercial pilot license, and immediately sought advice from the Federal Aviation Administration ("FAA") on landing his helicopter. The FAA informed him to check the local Town code to see if there were any rules against private airports in the Town.

Casciani checked the Town code and determined that there was no law prohibiting the landing of private aircraft in the Town. The FAA performed an informal site inspection and approved the site.

In or about 2003, Casciani purchased a small Enstrom 480/480B turbine powered helicopter and began flight training.

5. The Enstrom 480/480B Turbine Powered Helicopter

The Enstrom Helicopter product lines have one of the best safety records in the industry. Enstrom products have accumulated over 4 million flight hours and have obtained several significant safety recognitions. The

rotor system has never had a catastrophic failure. The Enstrom 480/480 B turbine powered helicopter also has the distinguished honor of never having a single fatality in its 17 years of service. The Enstrom 480 noise level is lower than the acceptable level established by the FAA.

6. The Town Had No Law Prohibiting Private Airports

At the time Casciani purchased his helicopter, the Town code placed absolutely no restrictions on private aviation, or privatized airports. While the Town already prohibited commercial aircraft facilities, the only law that regulated the creation of private airports is New York General Business Law § 249 ("§ 249").

Despite that fact, Town residents who were not Italian-American were permitted to take off and land their aircraft within the boundaries of the Town of Webster without having to comply with § 249 for decades.

Such aircraft owners included Town residents John Roesel, ("Roesel"), Brian Hegedorn, ("Hegedorn"), Richard Swingly, ("Swingly"), and Robert Becthtold. ("Bechtold").

It was common knowledge that Hegedorn, who flew his plane unimpeded for over 2 decades, had his own runway for his plane nicknamed "Brian's Landing."

The Town never required Hegedorn to "make it legal" by obtaining FAA approval or by making an application pursuant to ¶ 249.

Roesel has taken off and landed his seaplane within the boundaries of the Town, and continues to do so. The Town never required Roesel to "make it legal" by obtaining FAA approval or by making an application pursuant to ¶ 249.

Town resident Richard Swingly stored and landed his aircraft in the Town without incident or provocation from the Town. The Town never required Swingly to "make it legal" by obtaining FAA approval or by making an application pursuant to ¶ 249.

Town resident Bechtold owned 3 aircraft, including a 2 seated ultra light which high ranking Town officials, namely the Chairman of the Town Planning Board, were aware, and are currently aware, that Bechtold operates within the boundaries of the Town of Webster to this day. Indeed, the fact that Bechtold operates a 2 seated ultra light has been witnessed by Town of Webster residents flying his 2 seated ultra light as late as November 2008 along with a passenger. The Town never required Bechtold to "make it legal" by obtaining FAA approval or by making an application pursuant to ¶ 249.

7. Casciani Immediately Subject to Harassment by the Town

Shortly after purchasing his helicopter and beginning flight training, from August 2003 through June of 2007, Casciani was subject to the selective enforcement of the Town's codes and regulations by Town Code Enforcement Officer George Winter ("Winter").

8. Casciani Obtains FAA Approval on October 26th, 2004

Pursuant to § 249, on October 26th, 2004 Casciani sought and received formal, written FAA approval for two landing sites: (1) at his Bluffs residence location; and (2) at a 30 acre site located on Dewitt Road.

9. Town Officials Demand Casciani "Make it Legal"

In or about November of 2004, a meeting was held with Town Attorney Charles Genesee, Planning Board Member Anthony Casciani and Gary Kliest, asked Casciani to "come down and make [the landing of your helicopter] *legal.*"

Casciani pointed out that the Town Code had no prohibition on the landing of private aircraft, and that he had already obtained FAA approval. Attorney Genesee indicated to him that "there are those who believe that [he] was not correct," including then Town Board Supervisor Thomas and Oster. Genesee then suggested New York Business Law § 249.

Attorney Genesee then requested Casciani attend a Town Board Meeting in or about January of 2005, to "make it legal," despite the fact that it had never asked any other similarly situated aircraft owner in the Town to do the same.

After that meeting, Casciani had a private meeting with Town Board Supervisor Thomas where he pointed out that there was no law that outlawed the creation of

a private heliport; Thomas' response was **"I can zone you out just like I did the strip club,"** a reference to the Town's treatment of other Italian-Americans, in particular, Collichio.

10. Casciani Seeks Guidelines on Private Airport Establishment

According to the New York State Department of Transportation, ("NYSDOT") the first step in airport or heliport establishment is FAA airspace review and approval, which Casciani, unlike any other aircraft owner in the town, had already completed.

The next step is a request from the Town to have the NYSDOT Aviation Services Bureau review the airport/heliport proposal with regard to state standards and issue a positive determination to the municipality. (A-403-411). State standards require adequate approach surface clearance over roads, railroads, navigable waterways, *inter alia*, and compatibility with publicly owned buildings. (A-403-411).

In sum, the documents required for review by the NYSDOT Aviation Services Bureau include:

1. FAA airspace approval letter;

2. Topographic quadrangle which identifies the heliport location and the ingress/egress paths;

3. Plan view map at 1" equals 100' or 200' scale

4. Letter request from [the Town] with authorizing resolution.

Casciani compiled documents 1-3 to present to the Town Board to request that the NYSDOT Aviation Services Bureau review Casciani's "Airport/Heliport Proposal as per item number 4 and provide an "authorizing resolution."

11. January 27th, 2005 Town Board Meeting

Casciani distributed his "Heliport Proposal" to all of the Town Board members at the January 2005 Town Board meeting. In addition to items number 1-3, the Heliport Proposal included Casciani's October 26th, 2004 formal written FAA approvals of his landing sites at the Bluffs and De Witt Road.

The "Bluffs" location is located on the Irondequoit Bay; the preferred approach and departure path is from the water, and not over any private residences.

The De Witt Road location, also located on the Irondequoit Bay, is a 30 acre parcel of open land that runs adjacent to the 104 Expressway (that used to be the former Town garbage dump); the preferred approach and departure was from the Expressway, and this was not over any private residences.

The Heliport Proposal included letters of support from residents from both the Bluffs and the De Witt locations. The Heliport Proposal had letters of support from the Town Fire Department, Town Police Department, and Town Highway Department, all attesting to the benefits of the helicopter.

At the time Casciani submitted his proposal, and until the current day, no one in close proximity to either

the Bluffs or the DeWitt location had any objection whatsoever to the Casciani taking off or landing his helicopter.

From the outset of the meeting until its conclusion, which lasted about two and one half hours, Casciani was humiliated, ridiculed, harassed, and belittled by then Town of Webster Supervisor Thomas.

Casciani informed Town Board Supervisor Thomas that he had obtained FAA approval; Thomas responded "why did you do that?" Casciani then made the request that evening for the Town to request review by the NYSDOT Aviation Services Bureau, the last step in obtaining approval under ¶ 249, and to provide a resolution authorizing the same.

No action was taken with regard to Casciani's request and the meeting ended abruptly.

12. The Town Requests Casciani "Withdraw" His Application

Shortly after the January Town Board meeting, Attorney Genesee again approached Casciani and asked him to "withdraw [his] application [under §249] ." Attorney Genesee stated "that this was an election year, and the Town had no regulation for private airports in its code, that this could be embarrassing, that they intended to create a committee, that would regulate private aircrafts."

Attorney Genesee once again assured Casciani that the use of his helicopter would be "**grandfathered in**,"

to withdraw his application, that Casciani would continue to be allowed to land his helicopter where he had previously been allowed.

Not only was Casciani assured by Attorney Genesee that he would be "grand fathered in" Nesbitt also informed third parties that Casciani would be "grand fathered in."

13. The Real Reason Why the Town Asked Casciani to Withdraw His Application

The Town had ***no intention*** of "grand fathering in" Casciani's use of his helicopter when they asked him to withdraw his application. The real reason why they asked Casciani to "withdraw his application" would be explained by Supervisor Thomas at a subsequent April 21st, 2005 Town Board meeting:

> "Currently because the Town does not address this in the Town Code the next level of government that addresses this type of facility is the State Law. **If an application is submitted prior to the Town establishing an ordinance the Town would not have an opportunity to hold the applicant to the ordinance."**

The Town asked him to withdraw it because the Town knew that once Casciani was approved under General Business § 249, they "would not have the opportunity to hold [Casciani] to the ordinance."

14. Commissioner of Public Works Takes Sound Measurements of the Helicopter

Thereafter, Gary G. Kliest, Town Commissioner of the Department of Public Works, ("Commissioner Kleist") met with Casciani on February 11th, 2005 to take sound measurements of his helicopter.

Commissioner Kleist determined that the decibel readings of Casciani's helicopter during take off was 72dBA; and overhead, at approximately 500' - 72-74 dBA. Commissioner Kleist then measured the sound inside his own car at 55 mph and the reading was 68 dBA; and, noted for the record that **"with the window partially open that jumped to 71 dBA."**

The results of Commissioner Kliest's findings that determined that there was no noise issue with regard to Casciani's helicopter were sent to Supervisor Thomas and all members of the Town Board.

In fact, helicopter noise is statistically lower than the high pitch whine of a chainsaw or a snowmobile engine. A lawnmower is louder on average than a helicopter. Helicopter noise levels are on record as being less obtrusive than the noise of a truck, bus or motorcycle.

15. Joe Oster & Supervisor Thomas' Conspire to "Zone Out" Casciani

On February 16th, 2005, Oster sent an email to Supervisor Thomas to inform her that he was preparing for the next Town meeting where Casciani's helicopter

use would be discussed; in that e-mail he informed Thomas

> "what the angry mob is planning for tomorrow night"

Oster further stated that he was

> "saving all the big guns for next month, but are going to ask (strongly) that the Town at least stop [Casciani] from using his Heliports until they are approved, if ever, based upon the attached documents."

16. Oster's February 17th, 2005 Letter & CD Presented to the Webster Town Board

Oster compiled falsified evidence to demonstrate that Casciani's helicopter was somehow creating a "noise nuisance" in the level of noise it was producing. This was so because Commissioner Kliest had already measured Casciani's helicopter and had determined that there was no noise issue with regard to Casciani's helicopter and had sent those results to the Town.

On February 17th, 2005, Oster submitted a letter, CD, and other disparaging material to the Town Board, calling Casciani's helicopter use a "two year old nightmare."

The CD recording purports to record Casciani flying his helicopter, however, that tape has clearly been altered, i.e. "severely modulated" to make Casciani's helicopter sound louder than it actually does.

Further, Oster included numerous documents that attempt to impugn Casciani's helicopter use, including police reports that he himself filed.

In his letter, Oster claims that Casciani did not obtain approval and support from his neighbors to land in either proposed location.

Casciani's neighbors, however, were clearly supportive of his helicopter use, and continue to be so to this day. In fact, Oster's complaint is the only complaint received by the Town against Casciani, and the Town never refuted this simple fact by evidence in admissible form.

To this point, Nesbitt himself informed the Chairman of the Town Planning Board that he

> "was in a rock and a hard place" that "the people there last night (except who have other agenda's) where people who came into my store. **They are normal citizens who don't complain that much. That have concerns.**"

At the conclusion of his letter, Oster states "[w]hy would the Town approve one man's convenience....for something as capricious and unnecessary as this," which is a statement that Nesbitt would adopt when he zoned Plaintiff out:

> "I believe that the proposed law before the Town Board ... was one of convenience for a very few and not one of necessity for the majority of Webster residents."

17. February 17th, 2005 Town Board Meeting

In or about February of 2005, the Town had a public meeting where Casciani formally withdrew his application at the Town's request and promise that he would be "grand fathered in."

No complaints, however, regarding the noise or safety of Casciani's helicopter were uttered at that meeting, with the exception of Oster requesting that the Town "put the correct zoning in place to prevent" Casciani from "land[ing] in his backyard."

18. Zoning Law Committee

Thereafter, a committee was formed by the Town for the sole purposes of establishing zoning laws to regulate the use of private airports in the Town.

For the entire year that the committee met, the committee ***never*** studied any evidence of noise made by Casciani's helicopter nor analyzed safety issues.

At no time prior to the creation of this committee did the Town ever receive a complaint regarding the noise or safety of Casciani's helicopter at either the Bluffs location or the Dewitt location.

The only person who made any complaints at all was Oster, who, during this time, placed false statements in the media attesting to the "dangers" of operating helicopters in the Town, and even claimed falsely that he was a "pilot."

19. April 21st, 2005 E-Mail to the NYSDOT from the Town

On April 21st, 2005, at 3:10 p.m., Town Attorney Genesee sent an e-mail to the NYSDOT asking "can you please advise the length of time it normally takes (if there is a normal time period) for the NYSDOT to respond to a municipality's request for comment regarding private heliports or airports?"

The response from the NYSDOT was, in the "most common case" one to three days if an onsite inspection was not required, and one to two weeks if an onsite inspection was required.

That e-mail was forwarded to then Town Supervisor Thomas and other Town officials.

20. April 21st, 2005 Town Board Meeting: Moratorium

A Town Board meeting was held on April 21st, 2005, the same day the Town heard from the NYSDOT that Casciani's heliport could be approved in as little as one to three days; not surprisingly, the Town issued a "moratorium" on applications for private airports that evening, explaining:

> "Currently because the Town does not address this in the Town Code the next level of government that addresses this type of facility is the State Law. **If an application is submitted prior to the Town establishing an ordinance the Town would not have the opportunity to hold the applicant to the ordinance.**"

Because Casciani submitted his application prior to the Town zoning out the use of his helicopter, the Town asked him to withdraw it because the Town knew that once Casciani was approved under General Business § 249, they "would not have the opportunity to hold [Casciani] to the ordinance."

21. February 2nd, 2006 Town Board Meeting

By Resolution No. 98, the Town Board scheduled a public hearing to consider the newly proposed law entitled "Chapter 76 Airports and Heliports, private" set for March 2nd, 2006 and published it as the "**Heliport Hearing.**"

The original "Chapter 76" included the following sections:

§ 76-5 Applicability

C. All uses (and users) existing at the time of the effective date of this law shall have one (1) year to comply with the provisions of this Chapter.

§ 76-6 Exemptions

The following are exempt from the application of this chapter:

A. Aircraft landing or taking off from airports owned and operated by the Town of Webster, County of Monroe, State of New York, or the United States.

B. Any airport operated by the Town of Webster, County of Monroe, State of New York or the United States.

Chapter 76 also set out in § 76-8 Procedures for private airport/heliport special use permit, and details regarding applications for variances in § 76-21.

There were no exceptions for ultra light operation in the original version of Chapter 76.

22. March 2nd, 2006 Town Board Meeting

Prior to the March 2nd 2006 Town Board meeting, the Town had received no complaints about either the noise or the safety of Casciani's helicopter at either the Bluff or the Dewitt road location, other than Oster. Six e-mails referred to at the March 2nd 2006 hearing all commented on suggestions for the final version of Chapter 76 with regard to variances and the like.

The only actual e-mails that Supervisor Nesbitt received about Casciani's helicopter occurred ***after*** the March 2nd, 2006 Town Board meeting, all dedicated to Casciani personally, and only a few discuss noise or safety at all.

During the course of the March 2nd, 2006 public meeting it was clear Casciani was being publicly "singled out" and that no one was permitted to speak on Casciani's behalf, if only because Nesbitt intimidated them from doing so. During the course of this meeting, Attorney Chris Kodury attempted to speak positively about Casciani. Supervisor Nesbitt dropped the gavel, and admonished Kodury to sit down, thereby stifling any positive comments regarding Casciani.

Casciani's attorney objected to the futility of the proposed law as being not only unworkable, in that it

would take over one and a half years to receive a permit, and pointed out to Nesbitt that there was **no** other approval process in the Town of Webster or any other town that would take that long to obtain a permit.

23. Resolution No. 115

Nesbitt summarily concluded all discussion regarding the proposed Chapter 76 , and *sua sponte* legislated from the bench, and enacted Resolution No. 115, which banned all "private heliports" and prohibited any aircraft from landing in the Town. Resolution No. 115 also increases the amount of fines for a first offense from $350.00 to $500.00.

In the words of Town Supervisor Nesbitt, echoing that of Oster,

> "I believe that the proposed law before the Town Board ..was one of convenience for a very few and not one of necessity for the majority of Webster residents."

24. The New Law "Carving" Out 1 Manned Ultra Lights

The Town Board then drafted a new law that was created and proposed by Supervisor Nesbitt at the meeting, waited thirty days, convened a much smaller meeting on April 6th, 2006, and approved the revised version of Chapter 76.

Revised Chapter 76 contains the following definitions:

AIRCRAFT - A device that is used or intended to be used for flight in air.

ULTRA LIGHT - An aircraft that: (a) is used or intended to be used for manned operation in the air by a **single occupant**; (d) if unpowered, weighs less than 155 pounds; or (e) if powered: (1) **weighs less than 254 pounds empty weight.**

Revised Chapter 76 states in relevant part:

A. No aircraft shall land upon or take off from any place within the Town of Webster, except under the circumstances set forth herein.
This prohibition shall not apply to the landing of ultra light aircrafts or the airports solely servicing such aircraft.

Revised Chapter 76 also provides for increased fines and criminal enforcement:

§ 76-12 Enforcement; penalties for offenses.

Any violation of this chapter or of any other, requirement decision or determination issued by the Commissioner of Public Works, his/her agent or designee pursuant to this chapter is hereby declared to be an offense punishable by a fine not exceeding $500 or imprisonment for a period not to exceed six months, or both, upon conviction for a first offense; upon conviction for a second offense, both of which offenses were committed within a period of five years, punishable by a fine not less than $500 nor more than $700 or

> imprisonment for a period not to exceed six months, or both; and upon a conviction for a third or subsequent offense, all of which offenses were committed within a period of five years, punishable by a fine of not less than $700 nor more than $1,000 or imprisonment for a period not to exceed six months, or both.

Chapter 76 newly carved out an exception that *permitted* Bechtold to continue to fly his 2 manned ultra light, despite the fact that his 2 manned ultra light does not even fit the definition of ultra light within Chapter 76, which clearly defines an ultra light as

> An aircraft that: (a) is used or intended to be used for manned operation in the air by a **single occupant**; (d) if unpowered, weighs less than 155 pounds; or (e) if powered: (1) **weighs less than 254 pounds empty weight**..

Chapter 76 carves out the exception for Town resident Bechtold, even though Town officials were well aware that Bechtold operated a 2 manned ultra light, and that he continues to do so to this day, as witnessed by other Town of Webster residents.

At the March 2, 2006 meeting, Bechtold complained about the fact that Chapter 76 "has set up a condemnation of ultra light aircraft. The law either needs to be more specific and more accurate, or remove the ultra lights."

Bechtold, has to this day entered into several "Land Preservation" contracts with the Town of Webster for which he receives a tax abatement for the very

private airport he continues to use to this day. Bechtold had entered, historically, and has continued to enter into, Farmland Preservation Agreements with the Town as late as January 27th, 2009, extending him a tax abatement on nearly 80 acres in exchange for the promise not to develop his land, or to use his land in any way that would negate or diminish the natural capacity of his property, i.e. for agriculture.

However, it is clear that Bechtold is using that land for a private airport for his ultra light, in direct contradiction to that preservation agreement.

25. Similarly Situated Aircraft Owners Still Permitted to Take Off and Land in Webster

Other similarly situated aircraft are to this day permitted to take off and land in the Town of Webster. Roessel continues to take off and landing in the Town for over a decade with the full knowledge of the Town, but has not been asked to "make it legal." After April 6, 2006, Roessel asked Town Inspector Pellett what he had to do to comply with the law and was told

> "don't worry..go ahead and take off as usual...no one's gonna give you any problem... **that law's just for Casciani.**"

Since April 6, of 2006, Roessel has been taking off and landing his aircraft in the Town of Webster.

26. No Rational Basis

A. The FAA Perspective:

a. Ultra Lights More Dangerous than Helicopters:

The FAA position on ultra-lights is that they are not certificated as "airworthy" by any approved method. For safety reasons, the FAA placed the ultra lights in a restricted category, unlike a certified helicopter. That is why they are not permitted to fly over congested areas, or near airports.

For example, the hardware used to assemble the flight controls of an ultra light can be purchased at a local hardware store and are not guaranteed for strength. Conversely, an FAA certified helicopter uses only *approved aviation hardware and parts that are guaranteed for hardness and tensile strength.*

Helicopters will not fail in flight as opposed to ultra lights. This observation is based upon catastrophic incidents that have occurred in the past within the ultra light community.

Ultra lights come with several different power plants, ranging from chainsaw to snowmobile engines and are not required to be inspected or tested. Such engines were never designed nor intended to be used as aircraft engines. These engines lack the safety engineering that is incorporated into every FAA certified helicopter engine. Helicopter engines are inspected on an annual basis by qualified aircraft mechanics.

To categorically say that an ultra-light is less of a safety risk to the general populace, compared to a helicopter is incorrect. If it were true, the FAA would not have imposed strict limitations on the "ultra-light" community and prevented them from flying over populated areas and near airports.

b. Ultra Light Louder than Helicopter

The helicopter noise is statistically lower than the high pitch whine of a chainsaw or a snowmobile engine. Actually, a lawnmower is louder on average than a helicopter. Helicopter noise levels are on record as being less obtrusive than the noise of a truck, bus or motorcycle.

c. One-Manned Ultra Light Unsafe

During the public comment period before the final writing of FAR 103.15, (Operations Over Congested Areas), representatives from cities and towns throughout the nation, wrote the FAA of concerns with un-certificated aviation activities (low flight, buzzing, excessive noise) of ultra lights. Their consensus was ultra lights have no place flying over congested areas.

The following make it unsafe to fly a one-manned Ultra light:

- Ultra lights are not required to have airframe logbooks. Thus, pilots lack knowledge of the of the airframe, i.e. flight control hardware, cables, fabric, and their airworthiness condition.

- Structured flight training or a flying license are not required.

- A medical certificate regarding the pilots health, such as a heart condition, is not necessary.

- No expectation for anti-collision lights for seeing and avoiding other aircraft.

- The basic structural design of the Ultra light may be defective, due to the lack of FAA oversight. (Many have collapsed in flight while attempting to do basic aerobatic maneuvers, such as steep turns)

- Basic aeronautical skill sets, i.e. rudimentary knowledge of weather, effect of crosswinds, density altitude and lift, and the familiarity of right of way rules, are not required.

d. Two Manned Ultra Light Not Safe

Many ultra light owners experiment with possible unproven designs such as adding an extra passenger seat. The extra weight from the added seat and passenger pushes the "ultra light" into the airplane category and it no longer meets the requirements of FAR 103.1(a)(1), the ruling that made it an ultra light in the first place. It transitioned from being an "ultra light" into being an airplane which is in violation of FAR 103.1 The FAA would now consider this two seat ultra light "unairworthy."

The extra weight of the seat and passenger increases the original design stall speed and handling characteristics of the ultra light, making it less safe.

27. Bechtold's Ultra Light Is An Aircraft

Becthold's 2 manned ultra light is not permitted under Chapter 76 because it is not "1 manned" and by virtue of not being a 1 manned ultra light, it weighs more than 254 pounds as proscribed by Chapter 76 because it is considered to be an aircraft under Chapter 76.

The Town was duly aware of this fact when it drafted Chapter 76.

Becthold continues to fly his 2 manned ultra light to this day, unimpeded. Further, Bechtold still has not complied with § 249, has no FAA approval for his approach or departure path, and has never been mandated to do so, as Casciani clearly was.

28. Nesbitt Retaliates Against Casciani

On or about April 8th, 2008, Casciani filed a lawsuit in the District Court for the Western District of New York alleging violations of his civil rights.

On April 23rd , 2008, Nesbitt published the articles in the Webster Town Post and the Town of Webster web site citing that "taxpayers will have to pay for the costs associated with this lawsuit" further citing "higher health insurance premiums, rising fuel prices, plus the cost of equipment used by the town for numerous

necessary projects, while trying to keep taxes and spending down." On May 21st, 2008, a regular Town Republican Committee meeting was convened. Present at that meeting was Nesbitt and Town Planning Board Member Angelo Arcoleo.

At the end of the meeting, Arcoleo approached Nesbitt to discuss Casciani's lawsuit. Arcoleo asked Nesbitt whether the Town could "amicably resolve the matter regarding the prohibition of [Casciani] landing his helicopter in the Town," expressing his great concern that the costs of pursuing litigation of the pending lawsuit could negatively impact Town of Webster taxpayers.

In reply, Nesbitt stated, in contradiction of all former public laments regarding the potential costs of Casciani's lawsuit to the taxpayers of Webster:

> **"I don't care what it costs [the taxpayers]...I am not going to let Casciani get away with this!"**

Nesbitt inferred further that he intended to *retaliate* against Casciani for filing his lawsuit.

On June 4, 2008, Nesbitt published the following written statements in the Webster Post, a newspaper circulated to a large audience in the Western New York area entitled "No basis for accusations of prejudice." That same day, in the Webster Herald, Town Supervisor Nesbitt wrote an article entitled " Developer owes all town residents apology."

B. The Proceedings Below

1. The District Court Decision

The district court's decision on October 6, 2009 was another recent trial level federal case in New York involving a civil rights case based not on the public employment context, but on municipal land use regulation.

The district court applied *Engquist*, requiring that the plaintiff plead non-discretionary state action in order to allege a viable class-of-one claim. The court repeated the Supreme Court's observation that, "[t]here are some forms of state action...which by their nature involve discretionary decision-making based on a vast array of subjective, individualized assessments," and that "[i]n such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." (App. at 65a).

The district court explained further that "[a]lthough the Court in *Engquist* noted that '[t]his principle applies most clearly in the employment context,' numerous courts have applied *Engquist* to bar 'class of one' claims in connection with discretionary decisions made outside the government employment context." (App. at 66a).

The court stated that "[p]rior to the enactment of the ordinance, there was no law [in Webster] that specifically addressed the operation of aircraft with Webster, *other than a statute of general application* [,] which prohibited the operation of an 'airport' within a town anywhere in the state without approval from the town's governing body." (App. at 69a, emphasis added).

The Town, the court reasoned, could chose to do what it desired, and how the Town chose to do what it desired was held by the district court to be discretionary, without regard to the ill will they harbored against Casciani:

> "There were no written criteria, then for determining whether the operation of any particular aircraft within Webster constituted a problem that needed to be addressed, and any actions taken by the Town in that regard were entirely discretionary." (App. at 69a).

The district court further held that the Town's action taken toward enforcing the newly adopted ordinance after it was enacted was "necessarily discretionary," relying for its conclusion the following example given by the Supreme Court in *Engquist*:

> Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classification implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernable or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is not a proper challenge to what in its nature is subjective, individualized decision that it was subjective and individualized. (App. at 70a).

The district court reasoned that "plaintiff has also failed to show any non-discretionary acts by defendants, and his purported class of one claim is therefore barred under the reasoning of *Engquist*." (App. at 69a).

2. The Second Circuit Decision

The September 7th, 2010 Summary Order of the Second Circuit, without citing to *Engquist*, affirmed the decision of the district court which held that plaintiff failed to show any "non-discretionary acts by defendants, and his purported class of one claim is therefore barred under the reasoning of *Enqguist*." (App. at 69a). The Second Circuit endorsed that reasoning by claiming that the "challenged ordinance was *generally applicable* and was never enforced against either Casciani or the individuals to which he would compare himself." (App. at 4a, emphasis added).

3. Petition for Rehearing

The Petition for Rehearing requested that the Second Circuit reverse and remand its September 7th, 2010 Summary Order consistent with that Court's prior precedents with regard to traditional and *Olech* Equal Protection claims. The Petition was denied on November 22, 2010. (App. at 95a).

REASONS FOR GRANTING THE PETITION

1. There is a Circuit Split as to Whether *Engquist* Applies to *Olech* Class-of-One Cases Outside the Public Employment Sector

In *Engquist* the Court stated in dicta that "[t]here are some forms of state action...which by their nature

involve discretionary decision-making based on a vast array of subjective, individualized assessments," and that, "[i]n such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise."[7] The Court held that a class-of-one claim alleging discrimination for vindictive, irrational purposes is not a valid legal claim in the context of public employment.

Chief Justice Roberts agreed with *Engquist* that the Equal Protection Clause "protect[s] persons, not groups," and that the Clause protects persons from discriminatory individuals acting on behalf of the government, as well as from discriminatory legislative actions. The Court, however, rejected the claim that protection from irrational or arbitrary government employment decisions is a constitutional right against the "realities of the employment context," and second, that courts must differentiate between basic and secondary rights.

The Court reasoned that a class-of-one claim would clash with the realities of the public employment context because such a claim would force courts to make impossible comparisons of discretionary treatment of employees, undermine the efficiency of the government as employer, and impermissibly constitutionalize the employee grievance. *Id.* at 2156. Finally, the Court concluded that even if some class-of-one claims were worthy of constitutional protection, the governmental and legislative burden to litigate all such claims would be too great. *Id.* at 2157.

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7. 128 S.Ct. at 2154.

Justice Stevens, joined by Justices Souter and Ginsburg, dissented, criticizing the majority for depriving state employees of their constitutional right to freedom from "unequal and irrational treatment" by the government. *Id.* at 2157-58 (Stevens, J., dissenting). Justice Stevens broadly interpreted *Olech*'s holding as protecting individuals from any intentionally irrational government discrimination, regardless of the context, unless the actions have a rational basis. *Id.* at 2158.

The *Engquist* Court emphasized that *Olech* occurred in a relatively objective context, as did *Allegheny Pittsburgh Coal Co. v. Commission of Webster City*, 488 U.S. 336 (1989), and *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), the very cases on which the *Olech* Court relied. *Id.*, at 2153. Each of those cases regarded the differential enforcement of a law or government policy. The Court stated that in those types of situations, individuals may assert equal protection rights without being part of a class because one would expect those laws and policies to apply "without respect to persons." *Engquist*, 128 S.Ct. At 2153 (citation and internal quotation marks omitted).

Notwithstanding, *Engquist* has now been applied outside the public employment context into most any area where the government exercises "discretion" to bar class of one claims in connection with discretionary decisions made outside the government employee context, causing a circuit split that needs resolution by the Court.[8] For example, the Seventh Circuit applied

8. *See, e.g., Seymour's Barnyard, Inc. v. Town of Huntington*, No. 08-cv-3248, 2009 WL 1514610 at *7 (S.D.N.Y. June 1, 2009); *Crippen v. Town of Hempstead*, No. 07-cv-3478,

Cont'd

Engquist to probation decisions;[9] the Tenth and Eleventh Circuit applied *Engquist* to public contracting;[10] and the Eighth Circuit applied *Engquist* to police investigations.[11]

Lower federal courts, however, have been the most aggressive so far, expanding *Engquist* to apply to situations of traditional government regulation that strongly resemble the facts of *Olech* (landowner easement) and especially *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995)(liquor license), despite the fact that the Court in *Engquist* stated that in those types of situations regarding differential enforcement of a law or government policy individuals could assert equal protection rights without being part of a class because one would expect those laws and policies to apply "without respect to persons." *Engquist*, 128 S.Ct. at 2153 (citation and internal quotation marks omitted).

Following the decision in *Casciani*, the Second Circuit determined in *Analytical Diagnostic Labs, Inc. v. Kusel*, 2010 U.S. App. LEXIS 20422 (2d Cir. 2010) that:

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2009 WL 803117, at *6 (E.D.N.Y. March 25, 2009); *Marino v. Shoreham Wading River Central School Dist.*, No. 08-cv-0825, 2008 WL 5068639, at *7 (E.D.N.Y. Nov. 20, 2008).

9. *United States v. Moore*, 543 F.3d 891, 900-01 (7th Cir. 2008).

10. *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008); *Pignanelli v. Pueblo Sch. Dis. No. 60*, 540 F.3d 1213, 1222 (10th Cir. 2008).

11. *Flowers v. City of Minneapolis*, 558 F.3d 794, 799-800 (8th Cir. 2009).

> "We join the Seventh Circuit in holding that *Engquist* does not bar all class-of-one claims involving discretionary state action. While there may be some circumstances where *Engquist* is properly applied outside the employment context, the case before us is not one of them. Critically, the state defendants exercised the state's regulatory power."[12]

According to several of these post-*Engquist* lower courts, a plaintiff in an *Olech*-type case must not only show arbitrarily different treatment from others similarly situated, but a plaintiff must also demonstrate "that the differential treatment received resulted from non-discretionary state action."[13] That proposition seems inconsistent with the precedents of this Court which have emphasized individual rights in many subjective contexts.

For example, in *Yick Wo. v. Hopkins*,118 U.S. 356 (1886), the Court struck down the method by which a

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12. The court determined that the case before them did not involve discretionary decision making. However, this may be *obiter dictum* because the court affirmed the lower court's dismissal of the Plaintiff's claim due to Plaintiff's failure to prove disparate treatment.

13. *Sloup v. Loeffler*, No. 05-cv-1766 (JFB)(AKT), 2008 WL 3978208, at *15-16 (E.D.N.Y. Aug. 21, 2008); *see also Siao-Pao v. Connolly*, 564 F.Supp. 2d 232, 245 (S.D.N.Y. 2008) *See generally, Willets Point Indus. & Realty Ass'n v. City of New York*, No. 08-cv-1453 (ERK) (JO), 2009 WL 4282017, at *8 (E.D.N.Y. Nov. 25, 2009)("While the Second Circuit has yet to rule on the issue, district courts have almost universally extended the *Engquist* reasoning to all class of one claims, such that successful plaintiffs now must additionally establish that the differential treatment was a result of non-discretionary state action.").

board of supervisors granted business licences, despite the fact that the board had complete discretion. There the Court rejected the lower court's argument that the applicants could not assert Equal Protection rights due to the discretionary nature of the decisions, declaring that officials did not use their discretion in the way that it was legally given to them; rather, their use of discretion was "purely arbitrary, and acknowledges neither guidance nor restraint." *Id.* at 367.

In *McFarland v American Sugar Co.*, 241 U.S. 79, 86-87 (1916), Justice Holmes found that a state statute that bristled "with severities that touch the plaintiff alone" was arbitrary and a violation of equal protection.

In *Sioux City*, the Court struck down the full-value tax assessment of the petitioner who complained that other property owners in the same class enjoyed systematic assessments at less than full value. The petitioner was not a member of any class or category traditionally recognized under the Equal Protection Clause; nonetheless, the Court stuck down the full-value assessment explaining

> "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic underevaluation by state officials of other taxable property in the same class

> contravene the constitutional right of one taxed upon the full value of his property." 260 U.S. at 445 (citing *Sunday Lake Co. v. Wakefield Tp.* 247 U.S. 350, 252 (1918)).

In *Snowden v. Hughes*, 321 U.S. 1, 8-9 (1944), the Court held that unlawful administration of a state statute, resulting in unequal application to those who are entitled to be treated alike, is a denial of equal protection if there is shown to be present an element of "intentional or purposeful discrimination."

The next case in the sequence is *Olech*, where the petitioner challenged the local municipality's requirement of a 33 foot easement to connect her property to municipal water supply when the village had routinely required only a 15-foot easement from other similarly situated property owners. Olech did not contend that she was a member of a protected class; rather, she argued that the easement was "irrational and wholly arbitrary," and that "the Village's demand was actually motivated by ill will resulting from the [plaintiff's] previous filing of an unrelated, successful lawsuit against the Village." 528 U.S. at 563. The Court concluded that Olech had alleged a viable cause of action in that the requirement of the 33 foot easement was "irrational and wholly arbitrary." 528 U.S. at 565.

The *Engquist* decision leaves unanswered the future of class-of-one claims to discretionary state action when the government acts in its sovereign capacity. If the decision applies to sovereign acts, then the only valid class-of-one claims that remain are challenges to non-discretionary state actions. Applying *Engquist* to

sovereign state action gives state officials complete discretion to regulate individual citizens and increases the potential for abuse. For example, as applied here, *Engquist* prevents a class-of-one plaintiff like Casciani from challenging a state officials decision to create a law to ban the use of his private property merely because that state official possesses discretionary authority. In this light, the Equal Protection Clause would not protect the class-of-one plaintiff *even if* the local official abused his discretion. By applying *Engquist* to sovereign state actions, the Equal Protection Clause fails to protect individuals against oppressive, arbitrary sovereign power.

There is a circuit split regarding the extent of *Engquist*'s application outside the public employment context that must be resolved by this Court.

2. There is a Circuit Split as to Whether Class-of-One *Olech* Claims Require an Allegation of Subjective Ill Will

The possibility of a requirement of subjective ill will has its origin in Justice Breyer's concurrence in *Olech*. To avoid the prospect that class-of-one cases could be overused, Justice Bryer emphasized the presence of an "extra factor"-that the municipality bore some sort of "subjective ill will" toward the class-of-one plaintiff. *Olech*, 5228 U.S. At 566 (internal quotation marks omitted). The majority, however, did not require subjective ill will, and instead left it to the circuit courts to give context to the phrase "irrational and wholly arbitrary."

Since *Olech*, courts have struggled with the question whether class-of-one claims require an allegation of subjective ill will and are divided on the question.[14]

Prior to the 2008 *Engquist* decision, all nine circuit courts that had considered class-of-one Equal Protection claims upheld the validity of such claims, but disagreed on the standard to apply. The differences in the standards turned on how similarly situated a plaintiff had to be to another individual, and the degree to which a plaintiff had to show malicious motivation or ill-will on the side of the government.

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14. *See, e.g., MIMICS, Inc. v. Village of Angel Fire*, 394 F.3d 836, 849 (10th Cir. 2005)(suggesting that a class-of-one claim requires " 'persecution due to some animosity'" but also finding evidence that the official action was "objectively unreasonable"; *Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677, 683-84 (7th Cir. 2005)(noting contradictory lines of cases in the Seventh Circuit and reserving the question); *Bizzaro v Miranda*, 394 F.3d 82, 88 (2d Cir. 2005)(reserving the question); *Boone v. Spurgess*, 385 F.3d 923, 932 (6th Cir. 2004)(not requiring proof of an illegitimate motive); *Shipp v. McMahon*, 234 F.3d 907, 916 (5th Cir. 2000)(requiring "illegitimate animus or ill will), overruled on other grounds, *McClendon v. City of Columbia*, 305 F.3d 314, 322 n. 4 (5th Cir. 2002)(en banc)(per curiam); the Second Circuit has "repeatedly deferred the question of whether *Olech* eliminated the inquiry into defendant's bad faith intent," *Assoko v. City of New York*, 539 F. Supp. 2d 728, 735 (S.D.N.Y. 2008), citing *Harlen* , 273 F3d. at 499-500, although The issue of whether an action was motivated by malice has generally in the Second Circuit been a question of fact properly left for the jury. *See e.g. Lisa's Party City v. Town of Henrietta*, 185 F.3d 12, 17 (2d Cir. 1999) after analysis of "impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Harlen Associates v. Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001), quoting *LaTrieste Rest. & Caberet v. Village of Port Chester*, 40 F. 3d 587, 590 (2d Cir. 1994).

With regard to ill-will, some circuits applied a broad approach like that in *Olech*, leaving out the employer's subjective motive. Other circuits adopted a more stringent test requiring the plaintiff to demonstrate that the government actions were motivated by some type of ill will. This has led to confusion and uncertainty.[15]

By excepting all discretionary government action from the class of one claim, *Engquist* seems to eliminate any cause of action for a plaintiff harmed by the vindictive act of a government official when that act is part of an exercise of discretion. By failing to impose a bad faith requirement on the class-of-one claim, *Engquist* seems to endorse a federal equal protection claim every time a rule is not enforced in an absolutely uniform way.

3. Granting the Writ Will Resolve Ambiguity and Clarify the Extent to Which *Engquist* Should be Applied Outside the Public Employment Context, and What Role "Subjective Ill Will" Should Play in Traditional Equal Protection Cases

In removing individual equal protection rights from the public employment context, the Court hoped to prevent an overwhelming amount of Equal Protection litigation. *Engquist*, 128 S.Ct. at 2157. But *Engquist*

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15. *See Bell v. Duperrault*, 367 F.3d 703, 711-12 (7th Cir. 2004)(Posner, J., concurring)("May the Court enlighten us; the fact that the post-Olech cases all over the map suggests a need for the Court to step in an clarify its "cryptic" per curiam decision (internal citations omitted)(quoting Timothy Zick, Angry White Males: The Equal Protection Clause and "Classes of One," 89 Ky. L.J. 69, 133 (2000-2001))).

should mean only what it states, that is, that a particular type of Equal Protection claim in the public employment context is not viable.

By extending *Engquist* to contexts beyond the public employment sector, citizens, like Casciani, are denied their day in court when they are exposed to arbitrary treatment from government officials in subjective, discretionary contexts. In light of this Court's prior emphasis on the importance of individual Equal Protection rights, this should not be ignored.

CONCLUSION

Clarity on the application of the *Engquist* standard outside the public employment context, and the role "subjective ill will" should play in these claims will resolve the current circuit split on these issues.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

09-4170-cv

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of September, two thousand ten.

PRESENT: DENNIS JACOBS,
Chief Judge,

REENA RAGGI,
Circuit Judge,

Appendix A

JED S. RAKOFF, *
District Judge.

JOHN CASCIANI,

Plaintiff-Appellant,

-v.-

RONALD NESBITT, TOWN BOARD SUPERVISOR, In His Individual and Official Capacity, TOWN OF WEBSTER,

Defendants-Appellees.

Appeal from a judgment of the United States District Court for the Western District of New York (Larimer, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED.**

John Casciani challenges the grant of defendants' motion for summary judgment. We assume the parties'

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* District Judge Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

familiarity with the underlying facts, the procedural history, and the issues presented for review.

[1] We review a district court grant of summary judgment *de novo*. *Guest v. Hansen*, 603 F.3d 15, 20 (2d Cir. 2010). In ruling on a motion for summary judgment, the court must "construe the evidence in the light most favorable to the non-moving party and draw[] all reasonable inferences in [his] favor. *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005). However, the court is not required to draw *all* inferences in the nonmovant's favor, but only all *reasonable* inferences. A party may not avoid summary judgment with "assertions that are conclusory or based on speculation." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir. 2008) (internal citations omitted). Summary judgment is warranted where there is no genuine issue of material fact. *Allianz Ins. Co.*, 416 F.3d at 113.

[2] Casciani argues that he was the victim of selective enforcement of Chapter 76 of the Town of Webster Code ("Ordinance 76") or, in the alternative, that Ordinance 76 creates a "class of one" in violation of Casciani's Fourteenth Amendment right to equal protection. To establish either claim, Casciani must show both that he was treated differently than other persons who were similarly situated and that such differential treatment was either without rational basis (a "class of one" claim) or was motivated by an intent to discriminate on an

impermissible basis (a selective enforcement claim). *Cobb v. Pozzi*, 363 F.3d 89, 110 (2d Cir. 2004) (describing elements of "class of one" claim); *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995) (describing elements of selective enforcement claim).

We agree with the district court that Casciani failed to raise a genuine issue of fact as to disparate treatment. The individuals Casciani cites as examples were not similarly situated because they did not take off or land helicopters from residential property in the town. *See Doninger v. Niehoff*, 527 F.3d 41, 53 (2d Cir. 2008) (requiring plaintiff to show "extremely high degree of similarity" between himself and comparators). In any event, they were not treated differently because the challenged ordinance was generally applicable and was never enforced against either Casciani or the individuals to which he would compare himself. *See Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 210-11 (2d Cir. 2004) (holding that differential treatment is "prerequisite" to selective enforcement claim).

[3] Casciani argues that the passage of Ordinance 76 "chilled" his speech in violation of his First Amendment rights. However, Casciani offered no elaboration on this assertion and gave no specifics as to how Ordinance 76 qualifies as retaliation, what it retaliated against, or what speech of his it threatened to "chill." Arguments not made in an

appellant's opening brief are waived, and merely incorporating by reference an argument presented to the District Court or asserting an issue without advancing an argument does not suffice to adequately raise an issue for appellate review. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998); *see also Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (internal quotation marks omitted)). As a result of his failure to give even a bare-bones explanation of how his rights were infringed upon, Casciani has waived his First Amendment claim.

[4] Casciani argues that Ordinance 76 is unconstitutional on its face because it draws an arbitrary distinction between helicopters and ultralight aircraft. Ordinance 76 does not implicate any suspect class (race, gender, etc.) or fundamental right, so the proper standard of review is rational basis. *See Estate of Landers v. Leavitt*, 545 F.3d 98, 112 (2d Cir. 2008); *Greene v. Town of Blooming Grove*, 879 F.2d 1061, 1063 (2d Cir. 1989) (holding that city ordinance is entitled to presumption of validity and "will not be held unconstitutional if its wisdom is at least fairly debatable and it bears a rational relationship to a permissible state objective"). The party challenging such an ordinance bears the heavy burden of negating every conceivable rational and legitimate basis for

the ordinance. *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 75 (2001).

It is manifest that noise and safety are rational bases for the distinction between helicopters and ultralight aircraft. *See Heller v. Doe*, 509 U.S. 312, 319 (1993).

Finding that Casciani failed to raise a genuine issue of material fact with regard to any of his claims, we hereby **AFFIRM** the district court's granting of summary judgment for the defendants.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK, DATED OCTOBER 6, 2009

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

08-CV-6162L

JOHN CASCIANI,

Plaintiff,

v.

RONALD NESBITT, Town Board Supervisor,
In his Individual and Official capacity,
TOWN OF WEBSTER,

Defendants.

DECISION AND ORDER

Plaintiff, John Casciani, commenced this action under 42 U.S.C. § 1983 against defendants the Town of Webster, New York ("the Town") and Webster Town Board Supervisor Ronald Nesbitt, alleging that defendants violated plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution. Specifically, this action arises out of defendants' enactment of an ordinance ("the ordinance") prohibiting any private aircraft from taking off or

landing anywhere within Webster, a suburb of Rochester, N.Y. Plaintiff is a Webster resident who owns a helicopter that he has, in the past, flown from and to a landing pad that he has constructed on his property.

Defendants have moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Dkt. #10). Plaintiff has cross-moved to amend his complaint pursuant to Rule 15(a) (Dkt. #13).

On April 17, 2009, the Court issued an order ("Rule 12(d) Order") (Dkt. #21) notifying the parties of the Court's intention to convert defendants' motion to dismiss to a Rule 56 motion for summary judgment, under Rule 12(d) of the Federal Rules of Civil Procedure. Pursuant to that order, the parties have submitted additional evidence and other papers. *See* Dkt. ##22-28.

Having reviewed all the motion papers and the evidence before me, I conclude that defendants are entitled to summary judgment. Defendants' motion is therefore granted, plaintiff's cross-motion to amend his complaint is denied, and the complaint is dismissed.

BACKGROUND

In 2003, plaintiff purchased a helicopter for his personal use. To accommodate that use, plaintiff constructed a fourteen-square-foot concrete landing pad on his residential property in Webster.

Appendix B

When plaintiff bought and began flying his helicopter, the Town of Webster Code contained no provisions expressly dealing with private aviation or private airports within the Town. A state statute, however, New York General Business Law § 249, did provide in part that "[n]o person shall ... establish a privately-owned airport ... except by authorization of the governing body of the city, village or town in which such airport or any part thereof is proposed to be established or improved." For purposes of the statute, an "airport" is "any locality ... which is used or intended to be used for the landing and take-off of aircraft .... " *See* N.Y. Gen. Bus. L. § 240(4), (5) (incorporated by reference in § 249).

Plaintiff alleges that shortly after he began operating his helicopter on his property, George Winter, the Town's code enforcement officer, cited plaintiff for over a dozen code violations, mostly for matters that were not directly or explicitly related to plaintiff's helicopter, such as having unregistered motor vehicles parked on his property. Plaintiff alleges that other, similarly situated Webster residents were not so charged. According to plaintiff, the purpose of the citations was to harass him because of plaintiff's continued use of his helicopter.

Plaintiff alleges that in November 2004, the Town's attorney, Charles Genese, asked plaintiff to "come down and make [the use of his helicopter] legal," apparently meaning that plaintiff should seek the Town's authorization to operate a private airport under § 249. Amended Complaint ¶ 34. Although plaintiff asserted

that he was in compliance with all applicable laws, Genese responded that some Town officials disagreed, and he again asked plaintiff to attend an upcoming Town Board meeting to "make it legal." Amended Complaint ¶ 39.

Plaintiff did attend a meeting of the Town Board in January 2005. In advance of the meeting, plaintiff prepared a "heliport proposal," which he describes as "an extremely supportive document regarding Plaintiff's use of his helicopter on his personal land." Amended Complaint ¶ 47. The proposal included letters from some of plaintiff's neighbors, as well as the local fire, police and highway departments, "all attesting to the benefits of the helicopter." Amended Complaint ¶ 48.

At the meeting, plaintiff distributed copies of his proposal to the Board members. Plaintiff alleges, however, that after publicly "humiliating, ridiculing, harassing and belittling" plaintiff for two and a half hours, then-Town Supervisor Cathryn Thomas declared that a public hearing would be held, at a local auditorium, for the express purpose of addressing plaintiff's operation of his helicopter. Amended Complaint ¶ 52.

Subsequent to the January meeting, Genese spoke again with plaintiff, and allegedly asked plaintiff to "withdraw [Plaintiff's] application [under § 249]." Amended Complaint ¶ 53. Since that appears to be the first mention made in the complaint of any such application, it is not clear if that was a reference to

plaintiff's "heliport proposal," or if plaintiff had previously submitted a formal application for authorization of an "airport" pursuant to § 249.

In any event, Genese allegedly told plaintiff that the Town was preparing to draft an ordinance of some kind regulating the operation of private aircraft within Webster, but he assured plaintiff that plaintiff would be "grandfathered in," and that plaintiff would be allowed to continue flying his helicopter. Based on Genese's assurances, plaintiff withdrew his application.

The Town then formed a committee to establish zoning laws regulating the use of private aircraft and airports within Webster. For the next year, while the zoning law committee was drafting the proposed regulations, plaintiff continued to fly his helicopter as before, and, according to him, he continued to be harassed as before through the Town's selective enforcement of various property ordinances.

In February 2006, defendants completed a proposed ordinance concerning private aircraft and airports within Webster. As then drafted, the proposed ordinance provided for the creation of restricted districts within which aircraft could operate, for special use permits, and for variances with respect to aircraft use. *See* Pl. App. vol. I, Ex. R. Public notice of the proposed ordinance was given and a public hearing was scheduled for March 2, 2006.

Plaintiff and his then-attorney attended the hearing, and voiced their opposition to the proposed ordinance. Although the proposed ordinance would have allowed for private heliports in certain areas, and in other areas with a special use permit, plaintiff apparently believed that the ordinance was unduly restrictive in certain respects. Through his attorney, plaintiff objected to a number of aspects of the proposal, including its prohibition of commercial aircraft operation within Webster, and the process for obtaining the Town's approval of operation of a private heliport, which plaintiff considered too cumbersome and time-consuming. *See* Minutes of Mar. 2, 2006 Town Board Meeting, Pl. App. vol. I, Ex. S, at 89. Plaintiff also voiced numerous other objections to many details of the proposed ordinance. *Id.* at 89-96.

Plaintiff alleges that Ronald Nesbitt (who had succeeded Thomas as the town supervisor) then "*sua sponte* legislated from the Webster Town [sic] by proposing a motion that prohibited the flying and landing" of all private aircraft with the exception of "ultralite / sport experimental aircraft." Amended Complaint ¶ 71. According to plaintiff, Nesbitt's proposals were significantly more restrictive than the ordinance that had been proposed by the zoning committee. Plaintiff alleges that Nesbitt's proposed "ban on all private airplane and helicopter landings and a ban on all private airports and heliports was [sic] not part of the proposed law that was before the public on March 2, 2006." Amended Complaint ¶ 73.

Following that meeting, the Board drafted a new ordinance based on Nesbitt's proposals. Plaintiff alleges that the Town Board then "convened a much smaller meeting," and passed the new ordinance on April 6, 2006. Amended Complaint ¶ 74.

The new ordinance-the stated purpose of which is to "address the operation of private airports and heliports and the operation of private aircraft in the Town of Webster and to provide for the protection of the health, safety, and welfare of the residents of the Town," Dkt. #6 Ex. A at § 76-3-added Chapter 76 to the Town of Webster Code. That chapter, entitled "Aircraft, Airports, and Heliports, Private," provides in part that "[e]xcept as provided otherwise in this chapter, no private airplanes, private helicopters, private balloons, private hang-gliders, or private rotorcraft of any kind shall be permitted to take off or land or discharge or take on passengers within the boundaries of the Town of Webster." Dkt. #6 Ex. A at § 76-4. The ordinance also provides that "[n]o private heliport or airport will be permitted to be built within the boundaries of the Town of Webster." *Id.* at § 76-5. Plaintiff does not dispute that the operation of his helicopter and the maintenance of his landing pad fall within the scope of the prohibitions set forth in the ordinance.

The ordinance does contain several exemptions from its general prohibitions against the operation of private aircraft and airports. Specifically, the ordinance does not

apply to the landing of private "ultralight aircraft,"[1] to aircraft landing or taking off from publicly owned airports, or to publicly owned and operated airports themselves. *Id.* at §§ 76-7, 76-8. No exemption is made for helicopters, nor was plaintiff "grandfathered in," as he had allegedly been promised by Genese.

Plaintiff commenced this action on April 9, 2008, two years after enactment of the challenged ordinance. The amended complaint, which was filed as of right on May 22, 2008, asserts four causes of action. The first two causes of action allege that defendants have violated the Equal Protection Clause of the United States Constitution, based on two theories: "selective

1. An "ultralight aircraft" is defined by the ordinance as an aircraft that:

> A. Is used or intended to be used for manned operation in the air by a single occupant; B. Is used or intended to be used for recreation or sport purposes only; C. Does not have any US or foreign airworthiness certificate; and D. If unpowered, weighs less than 155 pounds; or E. If powered: (1) Weighs less than 254 pounds empty weight, excluding floats and safety devices which are intended for deployment in a potentially catastrophic situation; (2) Has a fuel capacity not exceeding five US gallons; (3) Is not capable of more than 55 knots' calibrated airspeed at full power in level flight; and (4) Has a power-off stall speed which does not exceed 34 knots calibrated airspeed.

Dkt. #6 Ex. A at § 76.6. It is undisputed that Plaintiff's helicopter does not qualify as an ultralight aircraft.

prosecution" and "class of one." The third cause of action alleges that defendants have violated the First Amendment by passing the ordinance in retaliation for plaintiff's exercise of his First Amendment rights. The fourth cause of action seeks a judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, declaring that the ordinance is unconstitutional.

DISCUSSION

I. Motions for Summary Judgment: General Principles

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted to the movant "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A fact is material if it might affect the outcome of the suit under the governing law." *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008) (citation and internal quotation marks omitted).

In determining whether the moving party is entitled to summary judgment, the court must "construe the evidence in the light most favorable to the non-moving party and draw[] all reasonable inferences in [his] favor." *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005). *See also Graham v. Henderson*, 89 F.3d 75, 79

(2d Cir. 1996) ("The evidence of the party opposing summary judgment is 'to be believed, and all justifiable inferences are to be drawn in [that party's] favor'") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

It bears emphasis, though, that this standard does not simply require the court to draw *all* inferences in the nonmovant's favor, but all *reasonable* inferences. The issue is whether a reasonable jury could find for the nonmoving party. *See, e.g., Reed v. City of St. Charles, Mo.*, 561 F.3d 788, 791 (8th Cir. 2009) ("Although a district court must rule on a motion for summary judgment after viewing the facts in the light most favorable to the non-moving party, it is not required to accept unreasonable inferences or sheer speculation as fact") (internal quotation marks omitted); *Carney v. City and County of Denver*, 534 F.3d 1269, 1276 (10th Cir. 2008) ("Although our summary judgment standard requires us to view the facts in the light most favorable to the non-moving party, it does not require us to make unreasonable inferences in favor of the non-moving party") (internal quotation marks and alterations omitted); *Caban Hernandez v. Philip Morris USA, Inc.*, 486 F.3d 1, 8 (1st Cir. 2007) (on a motion for summary judgment, "we must draw all reasonable inferences in the light most favorable to the nonmovant. That does not mean, however, that we ought to draw unreasonable inferences or credit bald assertions, empty conclusions, rank conjecture, or vitriolic invective") (citation omitted); *Berk v. St. Vincent's Hasp. and Med. Ctr.*, 380 F.Supp.2d 334, 342 (S.D.N.Y. 2005) (although court must construe

facts in light most favorable to nonmoving party, "That does not mean, however, that a party can successfully oppose summary judgment on the basis of an unreasonable view of the facts") (quoting *Edwards v. Akzo Nobel*, 193 F.Supp.2d 680, 688 (W.D.N.Y. 2001)).

II. Plaintiff's Claims

A. Equal Protection Challenges to Legislative Enactments in General

Plaintiff alleges that the ordinance violates his rights under the Equal Protection Clause of the Fourteenth Amendment. Such challenges can be premised on several different theories.

"There are two types of constitutional challenges to a statute [or other legislative act]: facial challenges, in which a statute is alleged to be unconstitutional on its face, *i.e.*, in all circumstances, and 'as applied' challenges, in which a statute is alleged to be unconstitutional under the particular facts of the plaintiff's case." *MONY Life Ins. Co. v. Ericson*, 533 F.Supp.2d 921, 928 n.9 (D.Minn. 2008) (citing *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011 (Mem.) (Scalia, J., dissenting from denial of petition for writ of certiorari)).

A legislative enactment may be struck down as unconstitutional on its face if the plaintiff demonstrates that it is "arbitrary and/or unreasonable, and not rationally related to a legitimate government interest."

Tanov v. INS, 443 F.3d 195, 201 (2d Cir. 2006). Rational-basis review is properly applied to legislation that does not implicate any suspect classifications or impinge upon the exercise of a fundamental right. *See, e.g., Estate of Landers v. Leavitt*, 545 F.3d 98, 112 (2d Cir. 2008); *Yuen Jin v. Mukasey*, 538 F.3d 143, 158 (2008).

An as-applied claim can also take several forms. One type of such a claim is the so-called "class of one" claim. A plaintiff proceeding on a class-of-one theory must show that he was intentionally singled out "for arbitrary treatment without a rational basis." *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006); *see also Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (plaintiffs state an equal protection claim where they allege that they were intentionally treated differently from other similarly situated individuals without any rational basis); *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 547 (7th Cir. 2008) (stating that "the classic example of irrational government action in a class of one equal protection case in this circuit is an ordinance saying: 'No one whose last name begins with "F" may use a portable sign in front of a 24-hour food shop, but everyone else may,'" and that "[w]hat makes the ordinance in the example irrational is not simply the act of singling out, but rather that the singling out is done in such an arbitrary way") (additional internal quotation marks omitted).

Closely akin to class-of-one claims are "selective enforcement" claims. Whereas a class-of-one claim typically focuses on the sheer irrationality of the manner

in which the plaintiff was treated, a selective-enforcement plaintiff must show that, compared with others similarly situated, he was selectively treated, and that "such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Miner v. Clinton County*, 541 F.3d 464, 474 (2d Cir. 2008) (quoting *Bizzarro v. Miranda*, 394 F.3d 82, 86 (2d Cir. 2005)); *accord Crowley v. Courville*, 76 F.3d 47, 52-53 (2d Cir. 1996).

In general, then, a plaintiff asserting a selective-enforcement claim must allege, and establish, that the challenged statute or ordinance subjected him to discrimination on the basis of some protected characteristic, such as his race, national origin, or sex. Such discrimination can be demonstrated in several ways:

> First, a law or policy is discriminatory on its face if it expressly classifies persons on the basis of [a protected category such as] race or gender. In addition, a law which is facially neutral violates equal protection if it is applied in a discriminatory fashion. Lastly, a facially neutral statute violates equal protection if it was motivated by animus and its application results in a discriminatory effect.

Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999) (citations omitted). Selective enforcement

claims are based on the second of those three scenarios, *i.e.*, discriminatory application of a facially neutral law. *United States v. Deberry*, 430 F.3d 1294, 1298 (10th Cir. 2005).

In the case at bar, plaintiff alleges in the complaint that the ordinance is unconstitutional both on its face and as applied. *See* First Amended Complaint (Dkt. #3),¶ 96. In his supplemental brief in response to the Court's Rule 12(d) Order, however, plaintiff appears to take the position that he is proceeding only on a theory of selective prosecution; he states that his theory in this case is based upon *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)-which has been described as the Supreme "Court's seminal selective prosecution decision," *Wayte v. United States*, 470 U.S. 598, 630 (1985) (Marshall, J., dissenting)-and he also recites the two-part test for selective-prosecution and selective-enforcement claims. *See* Dkt. #26-8 at 3-4 (quoting *Crowley*, 76 F.3d at 52-53).[2]

In spite of that assertion, however, there are aspects of plaintiff's arguments that appear to be closer to a

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2. Although the complaint uses the term "selective prosecution," for the purposes of this case there is no practical difference between a claim of selective prosecution and a claim of selective enforcement, and the two will be used interchangeably. *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1263-64 (10th Cir. 2006) (elements of selective-prosecution and selective-enforcement claims "are essentially the same"); *United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir. 2002) ("the same analysis governs both types of claims").

facial challenge to the ordinance. He has, for example, submitted two expert reports (Dkt. #26-10, #26-11) relating to the relative safety and noise levels of helicopters and ultralight aircraft. That suggests that plaintiff is also alleging that the ordinance is facially invalid, on the ground that there is no rational basis for the distinction that it draws between ultralight and other aircraft. In addition, plaintiff has not expressly disavowed reliance on his class-of-one claim, which is separately pleaded in the complaint.

Because it is not clear that plaintiff has limited himself to a selective-enforcement theory, and since there is some conceptual overlap between these various theories, both generally and in the factual context of this case, the Court will consider and address whether plaintiff has presented a viable equal protection claim under any theory. At any rate, "[t]he formal label under which an equal protection claim is reviewed is less important than careful identification of the interest at stake and the extent to which society recognizes the classification as an invidious one." *Ramos v. Town of Vernon*, 353 F.3d 171, 174 n. 1 (2d Cir. 2003) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 478 (1985) (Marshall, J., concurring in part and dissenting in part)). *See also Bowman v. United States*, 512 F.Supp.2d 1056, 1065 n. 4 (N.D.Ohio 2007) (finding no practical difference, on facts before the court, between plaintiff's as-applied and facial equal protection claims); *cf Hensley v. United States Drug Enforcement Agency*, No. 07-CV-398, 2007 WL 2177023, at *3 (S.D.Cal. July 25, 2007) ("without allegations to support

an as-applied challenge, the court must dismiss any counts based on this legal theory as unsupported labels").

B. Facial Validity

1. General Principles

As an exercise of the Town's police power, *see Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991), the ordinance is entitled to a presumption of validity, and "will not be held unconstitutional if its wisdom is at least fairly debatable and it bears a rational relationship to a permissible state objective." *Greene v. Town of Blooming Grove*, 879 F.2d 1061, 1063 (2d Cir. 1989); *see also Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959) (exercise of police power is presumed to be constitutionally valid); *Genesee Scrap Tin and Baling, Co. v. City of Rochester*, 558 F.Supp.2d 432, 434 (W.D.N.Y. 2008) (same); *Ecogen, LLC v. Town of Italy*, 438 F.Supp.2d 149, 157 (W.D.N.Y. 2006) (ordinance need not be "the most efficacious, wisest or fairest possible" to survive rational-basis review); *Empire State Restaurant and Tavern Ass'n, Inc. v. New York State*, 360 F.Supp.2d 454, 460 (N.D.N.Y. 2005) ("there is a strong presumption of validity for a statute passed pursuant to state or local police power").

An ordinance regulating property use will therefore be upheld unless it is "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, moral or general welfare." *Village*

of Euclid v. Ambler Realty Co., 272 U.S. 365, 385 (1926); *Ecogen*, 438 F.Supp.2d at 157. Such rational-basis review is applicable to both facial and as-applied challenges. *See Cook v. Gates*, 528 F.3d 42, 62 n. 12 (1st Cir. 2008) ("The plaintiffs acknowledge that a conclusion that the Act survives rational basis review defeats their facial and as-applied equal protection challenges"); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006) ("This basic formulation [of the rational-basis test] applies whether the plaintiff challenges a statute on its face [or] as applied").

In applying these principles, defendants' *subjective* motivation in enacting the ordinance is irrelevant to the question of whether the ordinance itself is constitutionally valid. *See Zilich v. Longo*, 34 F.3d 359, 363 (6th Cir. 1994) (court "may not invalidate ... legislative action based on the allegedly improper motives of legislators"). As long as "the statute or ordinance does not single out particular individuals or groups for benefits or burdens and is not challenged as discriminating on invidious grounds such as race, religion, and sex," the court "will not strike down an otherwise constitutional statute [or ordinance] on the basis of an alleged illicit legislative motive." *Fraternal Order of Police Hobart Lodge No. 121, Inc. v. City of Hobart ("F.O.P. Hobart")*, 864 F.2d 551, 554 (7th Cir. 1988) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)); *see also South County Sand & Gravel Co. v. Town of South Kingstown*, 160 F.3d 834, 839 (1st Cir. 1998) (stating that courts "ordinarily do not look behind ... legislation" and that "[i]n the ordinary course, the

background knowledge upon which enacted legislation is based is irrelevant"); *Sag Harbor Port Assocs. v. Village of Sag Harbor*, 21 F.Supp.2d 179, 185 (E.D.N.Y. 1998) ("whenever there exist plausible reasons for enacting a statute-whether or not those are the legislature's actual reasons for adopting the law-a court's inquiry is at an end") (citing *United R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980)).

One pragmatic reason for that principle is that to permit such challenges "would put at hazard a vast amount of routine legislation-federal, state, and local," all of which "would be subject to invalidation by a federal court" upon a showing that the legislators had enacted the legislation out of some personal motives. *F.O.P. Hobart*, 864 F.2d at 555. In order to avoid such a result, the Court is "entitled to presume the Ordinance to be valid and [is] not required to delve into the motivations of the Board members who proposed and drafted the Ordinance." *International Paper Co. v. Town of Jay*, 928 F.2d 480, 485 (1st Cir. 1991).

Indeed, even if legislation is enacted in direct response to a particular individual's actual or proposed activities, that alone will not render the legislation invalid, as long as it is "not pinpointed against a named individual or group[, and] is general in its wording and impact." *F.O.P. Hobart*, 864 F.2d at 556. *See also Flying J Inc. v. City of New Haven*, 549 F.3d 538, 547 (7th Cir. 2008) ("a classification is not irrational simply because it was adopted in response to a specific" activity or situation); *Pro-Eco, Inc. v. Board of Comm'rs of Jay*

County, 57 F.3d 505, 515 (7th Cir.) (stating that "legislatures may enact generally applicable legislation as a prophylactic to the danger posed by one particular actor as long as the end of the legislation is legitimate and ... the means are rationally related to the end," and finding that "[t]he Board's action here, even if unabashedly directed at a threat only Pro-Eco posed, was legitimate"), *cert. denied*, 516 U.S. 1028 (1995); *Northwestern University v. City of Evanston*, No. 00 C 7309, 2002 WL 31027981, at *6 (N.D.Ill. Sept. 11, 2002) ("the City's ... Ordinance, although motivated by concern over one particular actor, is generally applicable legislation which is rationally related to a legitimate government objective").

Consonant with these principles, the Court may consider whether the ordinance is rationally related to its *stated* purpose, but "that is ultimately not determinative, and in fact it is not necessary for defendants to enunciate *any* purpose" for the ordinance. *Ecogen*, 438 F.Supp.2d at 157 (citing *Panama City Med. Diagnostic Ltd. v. Williams*, 13 F.3d 1541, 1546 (11th Cir. 1994)) (emphasis added). Instead, "the proper inquiry is concerned with the *existence* of a conceivable rational basis, not whether that basis was actually considered by the legislative body." *Id.* (quoting *Haves v. City of Miami*, 52 F.3d 918, 922 (11th Cir. 1995)); *see also Lamers Dairy, Inc. v. United States Dep't of Agriculture*, 379 F.3d 466, 473 (7th Cir. 2004) ("Governmental action only fails rational basis scrutiny if no sound reason for the action can be hypothesized"); *WMX Technologies, Inc. v. Gasconade County*,

Missouri, 105 F.3d 1195, 1201 (8th Cir. 1997) (in adjudicating a constitutional challenge to an ordinance, "we do not inquire into the methods and motives behind its passage. We ask only whether a conceivable rational relationship exists between the ordinance and legitimate governmental ends"). Such a standard is most deferential to legislative enactments.

As the party challenging the ordinance, then, plaintiff has the burden to "negative every conceivable [rational and legitimate] basis which might support" the ordinance. *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 75 (2001) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). That burden is indeed a heavy one. *Mostowy v. United States*, 966 F.2d 668, 672 (Fed. Cir. 1992); *Sanitation and Recycling Industry, Inc. v. City of New York*, 928 F.Supp. 407, 412 (S.D.N.Y. 1996); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987) (to show that legislative act is unconstitutional, "challenger must establish that no set of circumstances exists under which the Act would be valid"); *see, e.g., Flying J*, 549 F.3d at 547 (plaintiff's allegation that municipality "maliciously and spitefully" enacted an amended zoning ordinance to thwart plaintiff's proposed construction of a travel plaza did not establish that amended ordinance was unconstitutional, since "the ordinance would presumably apply to any developer trying to construct a large-scale service station," and "[t]he district court was able to hypothesize several reasons for the amended ordinance").

I also note that a facial constitutional challenge to a legislative enactment generally presents questions of law, rather than of fact. As the term implies, a facial challenge to an ordinance must be decided with reference to the face of the ordinance, not the particular facts surrounding its passage. *See St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 519-20 (8th Cir. 1999) ("because the Association's complaint asserted a facial constitutional challenge, the issues presented to the district court were questions of law and the specific facts were not relevant"); *see also Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1311-12 (4th Cir. 1995) (facial challenge to city ordinance on First Amendment grounds involved questions of law that could be resolved on motion to dismiss), *vacated and remanded on other grounds*, 517 U.S. 1206 (1996); *Mann v. Calumet City, Ill.*, No. 08 CV 555, 2009 WL 395465, at *4 (N.D.Ill. Feb. 17, 2009) ("the [relevant] factual allegations [with respect to a facial challenge to an ordinance] are the provisions of the Ordinance" itself).

Likewise, where a constitutional challenge to an ordinance that was enacted pursuant to state or local police power is premised in part upon allegations of animus, such allegations (which will typically relate more to claims concerning the enforcement rather than the enactment of the ordinance) should not even be considered by the court unless the other allegations of the complaint are sufficient to overcome the presumption of rationality that attaches to such governmental action. *See Flying J*, 549 F.3d at 547 ("It is only when courts can hypothesize no rational basis

for the action that allegations of animus come into play"); *Lauth v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005) ("Animus comes into play only when, no rational reason or motive being imaginable for the injurious action taken by the defendant against the plaintiff, the action would be inexplicable unless animus had motivated it").

2. Application to this Case

Applying these principles to the case at bar, I find that plaintiff has failed to make out a valid claim that the ordinance is unconstitutional on its face. The ordinance is, quite plainly, rationally related to the protection of the health, safety and welfare of Webster residents. Although in some respects it might arguably have been better drafted, I am unable to say that the ordinance is so arbitrary or irrational as to bear no rational relationship to any permissible governmental objective. *See County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) (invalidating zoning legislation as irrational or arbitrary is proper "only if the governmental body could have had no legitimate reason for its decision") (quoting *Phillips v. Borough of Keyport*, 107 F.3d 164, 186 (3d Cir.) (Alito, J., concurring and dissenting), *cert. denied*, 522 U.S. 932 (1997)).

As stated, the ordinance is presumed valid, and plaintiff has fallen far short of "negativ[ing] every conceivable" rational basis for it. *Tuan Anh Nguyen*, 533 U.S. at 75. The stated purpose of the ordinance is to "address the operation of private airports and

heliports and the operation of private aircraft in the Town of Webster and to provide for the protection of the health, safety, and welfare of the residents of the Town." Dkt. # 6 Ex. A at § 76-3. The ordinance's prohibition on the operation of private aircraft and airports within Webster certainly bears a rational relationship to that legitimate interest. *See Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1211 (10th Cir. 2009) (plaintiffs' constitutional challenge to statutory amendments failed, since court "c[ould]not say the Amendments ha[d] no reasonably conceivable rational basis").

"[T]he Supreme Court ... ha[s] repeatedly held [that] noise, ... safety, aesthetics, [and] valuation of adjoining land ... are rational and permissible bases for land use restrictions." *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995) (internal quotation marks omitted). *See also Vision Church v. Village of Long Grove*, 468 F.3d 975, 1001 (7th Cir. 2006) (preventing noise pollution is a legitimate municipal land planning goal), *cert. denied*, 128 S.Ct. 77 (2007); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 659 (10th Cir. 2006) ("There can be little doubt that the City's zoning ordinance is rationally related to a legitimate government purpose: the promotion of public health, safety, and general welfare of the citizens of Cheyenne"); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 902 (8th Cir. 2006) ("It is undisputed [that] the purpose of the City's zoning ordinance, to protect public safety, is legitimate").

Appendix B

It would seem to be self-evident that prohibiting aircraft from taking off or landing within the Town of Webster, a heavily populated suburb, is rationally related to the goals of reducing noise and protecting the safety of Webster residents. *See Gustafson v. City of Lake Angelus*, 76 F.3d 778, 791 (6th Cir.) (city's prohibition on landing seaplanes on lake within city limits did not violate riparian owner's equal protection rights, since all similarly situated persons were similarly regulated, and ordinance was rationally related to legitimate land use concerns over noise, danger, apprehension of danger, destruction of property values, and interferences with other lawful uses of lake), *cert. denied*, 519 U.S. 823 (1996); *Caswell v. City of Bloomington*, 430 F.Supp.2d 907, 914 (D.Minn. 2006) (city's zoning ordinance regulating land use surrounding a newly constructed runway at municipal airport passed rational-basis test, since it was rationally related to legitimate government interest of protecting public safety); *Appeal of Green and White Copter, Inc.*, 25 Pa.Cmwlth. 445, 450 (1976) (stating that "heliports, particularly in residential areas, embody a land use, the total exclusion of which appears prima facie to be designed to protect the public interest," and that "[t]he potential safety problems and disturbances to the tranquility of the area are obvious").

Plaintiff, however, contends that the ordinance is arbitrary and irrational because it prohibits the operation of helicopters and non-motorized aircraft, but permits "ultralight" aircraft to land in residential neighborhoods. Specifically, the ordinance provides that the prohibition against the taking off or landing of

aircraft within the Town of Webster "shall not apply to the landing of ultralight aircrafts [sic] or the airports solely servicing such aircraft .... "[3] Dkt. #6-2 Ex. A at § 76-7(A).

In support of his argument in this regard, plaintiff has submitted two expert reports, prepared by William K. White and Phillip E. Ide. White, who is the managing director and chief inspector of AeroEd Inspection Services, LLC, opines in his report with respect to "the mechanical safety of an ultra-light as opposed to a helicopter and the specifications of ultra-light aircraft." Dkt. #26-10 at 1. Ide, a self-described "aviation consultant" with relevant experience working for the Federal Aviation Administration ("FAA") and in the United States Army, renders his opinion about "safety and noise concerns related to helicopters as compared to ultralight aircraft." Dkt. #26-11 at 1. The main thrust of both reports is that ultralight aircraft are no safer (or quieter) than helicopters.

Defendants contend that these reports do not meet the requirements of Rule 26(a)(2)(B) of the Federal Rules

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3. The ordinance does not expressly address the *taking off* of ultralight aircraft. That omission is not germane to the issues in this case, however.

In addition, the ordinance provides exceptions, which are likewise not at issue here, for "emergency helicopters in the normal course of their duties" and for aircraft being used in connection with "approved construction projects in the Town ... ." Dkt. #6-2 Ex. A at § 76-7(A).

of Civil Procedure because they do not list all cases in which the alleged experts have testified during the previous four years, and do not include statements concerning the experts' compensation in this case.[4] I find it unnecessary to reach that issue, however, for the reason that the opinions expressed in these two reports are largely immaterial to the issues before me, precisely because they *are* opinions.

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4. Rule 26(a)(2)(B) provides that

> Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report-prepared and signed by the witness-if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
>
> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
>
> (ii) the data or other information considered by the witness in forming them;
>
> (iii) any exhibits that will be used to summarize or support them;
>
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

As stated, the ordinance must be upheld "if its wisdom is at least *fairly debatable* and it bears a rational relationship to a permissible state objective." *Greene*, 879 F.2d at 1063 (emphasis added); *accord Tarantino v. City of Horn ell*, 615 F.Supp.2d 102, 117-18 (W.D.N.Y. 2009). The opinions of plaintiff's experts may be well-reasoned (though I need not and do not conclude that they are), but they do not demonstrate so conclusively that ultralights are at least as, if not more dangerous than helicopters as to put the question beyond fair debate. *See Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1211 (10th Cir. 2009) (stating, with respect to amendments to state statutes concerning storage of firearms locked in vehicles on owners' property, that court "need not decide the long-running debate as to whether allowing individuals to carry firearms enhances or diminishes the overall safety of the community. The very fact that this question is so hotly debated, however, is evidence enough that a rational basis exists for the Amendments") (citing *Euclid*, 272 U.S. at 388); *Texas Mfd. Housing Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095, 1106 (5th Cir. 1996) (on rational-basis review, challenged zoning decision may be overturned only upon a showing "that the legislative facts on which the classification is apparently based could not reasonably be *conceived* to be true by the governmental decisionmaker") (quoting *Vance v. Bradley*, 440 U.S. 93, 110-11 (1979)) (emphasis added), *cert. denied*, 521 U.S. 1112 (1997).

It bears repeating at this point that, with respect to the facial validity of the ordinance, the ultimate

question is not whether the ordinance is wise, or even logical, but simply whether it bears *some* rational relationship to a legitimate end. *See Heller*, 509 U.S. at 319 ("rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices'") (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). As the Second Circuit has explained, "'[r]ational basis review ... turns on whether there are "plausible" reasons for [the legislative body]'s choices,'" not whether those choices are the best ones that could have been made. *Weinstein v. Albright*, 261 F.3d 127, 140 (2d Cir. 2001) (quoting *General Media Comm., Inc. v. Cohen*, 131 F.3d 273, 286 (2d Cir. 1997), *cert. denied*, 524 U.S. 951 (1998)). The ordinance at issue easily passes muster under that deferential standard.

No matter how persuasive the opinions of plaintiff's experts might be, they are, ultimately, just that: their *opinions*. Defendants might well have formed a different opinion. The determinative question is not whose opinion is "better," or whether plaintiff's *experts'* conclusions are sound, but whether there are some conceivable rational reasons for what *defendants* did here. *See Estill v. Cool*, No. 08-cv-606, 2008 WL 4560768, at *8 (S.D.Ohio Oct. 9, 2008) (stating that "[t]he law does not require Ohio's General Assembly to have a rational basis to impose one requirement [for public office] while rejecting another .... What the law requires is simply rationality for what *was* imposed. The wisdom of many such [legislative] choices will always be open to debate by individuals of equal intellect, but the mere act of

choosing is neither irrational nor unconstitutional") (emphasis added).

Regardless of how reasonably or well grounded White's and Ide's reasoning and analysis might be, then, they cannot show that the *Town's* choices, as embodied by the ordinance, are wholly irrational. The purported expert reports are therefore, as stated, largely irrelevant to the issues before me. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000) (stating, with respect to age-based classifications, that the fact "that age proves to be an inaccurate proxy in any individual case in irrelevant," because, "where rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect'") (quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976)).

Furthermore, any assessment of the relative safety of helicopters and ultralights depends to a great extent on how one defines "safety" in that context. There are many variables and parameters that could enter into such an equation: the frequency of crashes associated with each type of aircraft, the severity of a typical accident involving a given aircraft, and so on. White's and Ide's own reports demonstrate this, since they base their opinions (as indeed they must) on particular criteria that *they* deem relevant and important, such as the degree to which helicopters and ultralights are regulated by the FAA, and what they believe to be the typical practices of ultralight pilots (*e.g.*, Ide opines that "[m]any ultralight owners experiment with possible

unproven designs such as adding an extra passenger seat").

All that these reports prove, then, is that it is impossible to reduce the *desirability* of allowing helicopters, ultralights, or other aircraft to operate within a particular area to a precise mathematical formula. Such decisions necessarily depend on imprecise, subjective judgments and perceptions that defy quantification, and which are, in the end, incapable of being "proven" or "disproven." It is precisely for that reason that such decisions are ill-suited to judicial review and are instead committed to the legislative sphere. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 592 (1978) (the "exclusionary line challenged by respondents ... represents a policy choice ... made by that branch of Government vested with the power to make such choices"); *Powers v. Harris*, 379 F.3d 1208, 1216-17 (10th Cir. 2004) (stating that "rational-basis review does not give courts the option to speculate as to whether some other scheme could have better regulated the evils in question," and that court may not "overturn a statute on the basis that no empirical evidence supports the assumptions underlying the legislative choice"), *cert. denied*, 544 U.S. 920 (2005).

As this Court has previously stated,

> [c]ourts will not strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish, because the problem could have been better

> addressed in some other way, or because the statute's classifications lack razor-sharp precision. This is the standard of review because the judicial system has long recognized that the problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific.

Ecogen, 438 F.Supp.2d at 149 (W.D.N.Y. 2006) (internal quotes and alterations omitted). *See also Greater Chicago Combine and Center, Inc. v. City of Chicago*, 431 F.3d 1065, 1072 (7th Cir. 2005) (stating, with respect to challenge to municipal ordinance prohibiting keeping of pigeons in most residential areas, "It is true that other animals make noise, leave droppings, and can be otherwise unsavory. Nonetheless, without delving into the distinctions between pigeons and dogs, for instance, we can put this issue to rest by simply acknowledging that a city's decision to address a problem gradually is rational"); *Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000) ("Absent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land-use context, the plaintiff must demonstrate 'governmental action wholly impossible to relate to legitimate governmental objectives'") (quoting *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995)).

Plaintiff also raises a few other arguments bearing upon the facial validity of the ordinance, but these require only brief mention. First, plaintiff states in his memorandum of law that the ordinance "carves out [an

exception allowing] the use of a private ultralite [aircraft] ... to land in the backyard of Robert Bechtold," who also lives in Webster. Dkt. #14 at 24. While that may be plaintiff's interpretation of the ultralight exception, the ordinance itself says nothing about Bechtold or any other particular property or aircraft owner; it simply creates a general exception for ultralight aircraft. Furthermore, even assuming that the underlying purpose of the ultralight exception was to benefit Bechtold, however, that is irrelevant to whether the ordinance is *facially* valid.[5] *Zilich*, 34 F.3d at 363; *F.O.P. Hobart*, 864 F.2d at 554.

That the ordinance might have the practical effect of benefiting Bechtold or some other individual is not dispositive. The law is clear that a "classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 319 (1993)

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5. Plaintiff alleges that "the only reason" for the ultralight exclusion was that Bechtold has entered into agreements with the Town in which he agrees not to develop certain property that he owns, in exchange for tax abatements on that property, in furtherance of the Town's "open space" policies. Plaintiff's Rule 56.1 Counter Statement (Dkt. #26) ¶ 136. Although plaintiff has submitted a copy of those agreements, *see* Pl. App. vol. I, Ex. U, he has presented no evidence to support his "connect the dots" reasoning implying a nexus between those agreements and the ordinance. In any event, even if these property agreements are the "real reason" for the ultralight exemption, that would not render the ordinance constitutionally infirm, as explained above.

(quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)); *see also Rojas-Reyes v. I.N.S.*, 235 F.3d 115, 123 (2d Cir. 2000) (legislative acts "need not result in the most just or logical result in every case to pass constitutional muster").[6]

Plaintiff's contention that the ordinance is irrational because it permits ultralight aircraft to operate, but not other relatively lightweight or quiet aircraft such as hang gliders or balloons, is a red herring. Plaintiff is not seeking to be allowed to fly a balloon or a hang glider, but a helicopter. The salient distinction, then, for purposes of this case, is that between ultralight aircraft and helicopters, and it is rather obvious that there are significant differences between the two and the manner in which each operates.[7]

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6. Paradoxically, plaintiff alleges that the Town deliberately carved out the ultralight exception so that Bechtold could continue to operate his ultralight craft, yet he also alleges that, as drafted, the exception does not actually cover Bechtold's plane. Plaintiff alleges that Bechtold's aircraft exceeds the weight and passenger limitations of the ordinance's definition of ultralight aircraft. Dkt. #26-8 at 25. Regardless, Bechtold and his purported ultralight are not similarly situated to plaintiff and his helicopter.

7. The Court can postulate some distinctions between ultralights and other lightweight or relatively quiet aircraft. The drafters of the ordinance may have believed, for instance, that balloons and hang gliders, being to some extent at the mercy of the wind, are therefore not as capable of landing in a precise location as are ultralight, motorized aircraft. They may also have believed that hot air balloons are simply too large to be compatible with a residential area.

(Cont'd)

Appendix B

What all of plaintiff's arguments boil down to is a contention that the ordinance is invalid because, in enacting the ordinance, the Town drew a line, allowing some aircraft to operate within Webster, and others not to. Plaintiff may be unhappy with the side of the line on which he finds himself, but there is no basis in the law for requiring a legislative body to take an all-or-nothing approach to dealing with a perceived problem. *See Williamson v. Lee Optical*, 348 U.S. 483 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others"); *Railway Express Agency v. New York*, 336 U.S. 106 (1949) ("It is not a requirement of equal protection that all evils of the same genus be eradicated or none at all"); *see, e.g., USA Baseball v. City of New York*, 509 F.Supp.2d 285m 295 (S.D.N.Y. 2007) (in suit challenging city's ban on use of certain types of bats in high school baseball games, plaintiffs' argument that there was no logical basis for distinguishing between non-wood composite bats and wood composites or wood laminates failed, since city could "act incrementally or draw the line imperfectly so long as there was ... a conceivable rational connection between the classification drawn and a legitimate purpose").

(Cont'd)

Again, though, whether such considerations actually did play a role in defendants' thinking, or whether such beliefs are completely correct, is not the issue. What matters is whether there is a *conceivable* rational relationship between the ordinance and some legitimate governmental objective. *See Powers*, 379 F.3d at 1217 ("this Court is *obligated* to seek out ... conceivable reasons for validating a ... statute," regardless of whether legislature actually considered those reasons).

C. Selective-Enforcement and Class-of-One Claims

As stated, the first and second causes of action in the amended complaint assert equal protection claims based respectively on theories of selective enforcement and "class of one." The gist of both claims is that plaintiff has been treated differently from other similarly situated persons, for no legitimate reason.

"While the Second Circuit has not resolved the question of whether there is truly a distinction between selective enforcement and class of one equal protection theories, courts in this circuit have repeatedly treated them as distinct theories with distinct elements of proof and have accordingly evaluated them as separate claims." *Sloup v. Loeffler*, No. 05-CV-1766, 2008 WL 3978208, at *14 n. 18 (E.D.N.Y. Aug. 21, 2008) (quoting *Bonenfant v. Kewer*, No. 05cv01508, 2007 U.S. Dist. LEXIS 64104, at *24 (D.Conn. Aug. 30, 2007)). *See also African Trade & Info. Ctr. v. Abromaitis*, 294 F.3d 355, 363-64 (2d Cir. 2002) (plaintiffs' allegation that government official refused to contract with them because they had publicly criticized his conduct in office did not allege that the actions were irrational, as required for a class-of-one equal protection claim, but that they were *impermissible* under the First Amendment); *Vassallo v. Lando*, 591 F.Supp.2d 172, 184 n. 9 (E.D.N.Y. 2008) (employing "the slightly different formulations set forth by the Second Circuit for each claim"); *Lavoie-Francisco v. Town of Coventry*, 581 F.Supp.2d 304, 312 (D.Conn. 2008) (selective-

enforcement and class-of-one claims are "two related, yet different, equal protection arguments") (quoting *Cobb v. Pozzi*, 363 F.3d 89, 109 (2d Cir. 2004)). Therefore, I will evaluate Casciani's class-of-one and selective enforcement claims separately, although I reach the same result as to both. *See Balakrishnan v. Kusel*, No. 08-cv-1440, 2009 WL 1291755, *6 (E.D.N.Y. May 8, 2009) (stating that "it is not entirely clear whether the selective enforcement cause of action as articulated [by the Second Circuit] still exists in light of the Supreme Court's 'class of one' jurisprudence," but adding that "in an abundance of caution, the Court has analyzed plaintiff's selective enforcement claim as a separate cause of action" from his class-of-one claim).

1. Selective-Enforcement Claim

To state a selective-enforcement claim, plaintiff must allege that, compared with others similarly situated, he was selectively treated, and that "such selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person." *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995); *accord Jones v. J.C. Penny's Dept. Stores, Inc.*, No. 03-CV-920, 2007 WL 1577758, *9 (W.D.N.Y. May 31, 2007). "A plaintiff generally must satisfy both elements to establish a claim of selective enforcement." *Washpon v. Parr*, 561 F.Supp.2d 394, '409 (S.D.N.Y. 2008) (quoting *La Trieste Rest. v. Village of Port Chester*, 188 F.3d 65, 70 (2d Cir. 1999)).

In the case at bar, plaintiff asserts that he was subject to selective enforcement of (1) the ordinance, (2) Gen. Bus. L. § 249, and (3) various town code provisions. The evidence in the record supports none of these claims, however.

There are two fundamental flaws with all three of these claims. First, most of the individuals with whom plaintiff seeks to compare himself were not similarly situated to him during the relevant time periods. Second, plaintiff cannot show that the ordinance, § 249, or the Town code provisions were actually *enforced* against him at all, much less that they were *selectively* enforced.

"[D]emonstrating that a plaintiff has been treated differently from similarly situated individuals is the *sine qua non* of a ... selective enforcement violation." *Kamholtz v. Yates County*, No. 08-CV-6210, 2008 WL 5114964, at *5 (W.D.N.Y. Dec. 3, 2008) (internal quotation marks omitted). The Second Circuit has held that at the initial pleading stage, a "general allegation" to that effect is sufficient. *DeMuria v. Hawkes*, 328 F.3d 704, 706 (2d Cir. 2003). *But see Assoko v. City of New York*, No. 06-cv-11414, 2009 WL 1108745, at *4 (S.D.N.Y. Apr. 24, 2009) (noting that "the Second Circuit has not yet revisited" the "liberal *DeMuria* standard" in light of the Supreme Court's stiffening of the federal pleading requirements in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

Pursuant to this Court's Rule 12(d) Order, however, we have moved beyond the pleading stage, and are now

at the summary judgment stage. The standards with respect to the similarly-situated element are much more stringent on a summary judgment motion than on a Rule 12(b)(6) motion for failure to state a claim. It is not enough at this point for plaintiff simply to allege that he and others were similarly situated; "at the summary judgment stage, a plaintiff must present *evidence* comparing [himself] to individuals that are 'similarly situated *in all material respects.*'" *Vassallo*, 591 F.Supp.2d at 184 (quoting *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000)) (emphases added and additional internal quotation marks omitted); *see, e.g.*, *Tarantino*, 615 F.Supp.2d at 113 (granting summary judgment for defendants on plaintiff's claim of selective enforcement where plaintiff "failed to show that he and the other landlords that he has identified were similarly situated in all material respects").

Although determining whether parties are similarly situated is typically "a fact-intensive inquiry," *Clubside*, 468 F.3d at 159, a "court may grant summary judgment in a defendant's favor on the basis of lack of similarity of situation ... where no reasonable jury could find that the persons to whom the plaintiff compares [him]self are similarly situated." *Id.*; *accord Maulding Development, LLC v. City of Springfield*, 453 F.3d 967, 970 (7th Cir. 2006); *see also Cordi-Allen v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2007) (although "the ultimate determination as to whether parties are similarly situated is a fact-bound inquiry[,] that does not mean that every case ... is a jury case"); *Neilson*, 409 F.3d at 106 (holding that no rational person could have found that alleged comparators were

similarly situated, notwithstanding jury's finding to the contrary).

In the case at bar, plaintiff has identified several individuals who he claims were similarly situated to him, but before examining their particular circumstances, it is necessary to establish *which* circumstances are material to that determination. As stated, plaintiff must show that he has been treated differently from others who are similarly situated to him in all material respects. Determining what is "material" in that regard, however, can only be determined with reference to the particular "treatment" at issue. For example, if a property owner alleges that a particular zoning ordinance has been enforced against him but not against other property owners, whether the other property owners put their properties to the same use as the plaintiff may be material if the ordinance at issue relates to permissible property uses, but not if it relates to minimum lot size.

With respect to the ordinance itself, it seems self-evident that to be similarly situated to plaintiff, an individual would at the very least have to be subject to the ordinance; in other words, someone who owns or operates an aircraft within the Town of Webster that is covered by the ordinance. *See Hill v. City of Scranton*, 411 F.3d 118, 127 (3d Cir. 2005) (all city employees who were subject to city ordinance's residency requirement were similarly situated for purposes of First Amendment and equal protection analysis). If a particular individual is not covered by the ordinance, then the Town's "failure" to enforce the ordinance against that person

would be probative of nothing; there would be nothing to enforce against that person.

Plaintiff has identified only two individuals who, he alleges, own and have operated aircraft in Webster since the passage of the ordinance: Bechtold and John Roessel. Bechtold allegedly owns three aircraft. *See* Pl. App. vol. II, Ex A ¶ 18. As stated, however, Bechtold flies ultralight aircraft, which are expressly permitted by the ordinance.[8]

8. Another individual, Richard Swingly, has allegedly operated some unspecified aircraft, at some point in the past, within the Town of Webster. Plaintiff does not appear to dispute defendants' contention that Swingly has not operated a plane within Webster for at least 20 years, however. Dkt. #22, ¶ 40.

Plaintiff also alleges that one Brian Hegedorn has flown "sesnas" without interference from the Town. Dkt. #26-8 at 7. Again, plaintiff does not appear to dispute that Hegedorn has not flown any aircraft within Webster in over two decades. *Id.*

While it is immaterial to my decision, since there is no indication that Hegedorn ever operated a helicopter or was otherwise similarly situated to plaintiff, it is not clear what "sesnas" refers to. Jack Roessel states in his affidavit that he owns a "Senna 180 Seaplane," so perhaps "sesnas" is a misspelling of "Sennas."

It appears, however, that "Senna" may itself be a misspelling of "Cessna." A "Google" search using the search terms "180 seaplane" turns up several sites referring to a "Cessna 180" model seaplane, but no "Sennas." Meanwhile, a search for "Senna seaplane" yields no relevant results, and a search for "sesna" produces a Ukrainian internet search engine by that name and a handful of other sites having nothing to do with aircraft. There is nothing in the record before me to indicate that "sesnas" refers to any type of helicopter.

Plaintiff alleges that in fact, one of Bechtold's aircraft is a two-seater ultralight, and hence does not fit within the ordinance's definition of an ultralight as an aircraft that, *inter alia*, "[i]s used or intended to be used for manned operation in the air by a single occupant," and "[w]eighs less than 254 pounds empty weight .... " In support of that assertion, plaintiff has submitted the report of one of his experts, William White, who asserts that "[t]he minimum empty weight of a 2 manned ultra-light is 325 pounds." Dkt. #26-10 at 3. Plaintiff has also submitted the affidavit of James Kubrich, who states that he lives next door to Bechtold and that "[o]nce in a while" Kubrich has seen Bechtold flying with a passenger in his ultralight. Pl. App. vol. II, Ex. H ¶ 5. He also states that "[t]he last time [he] observed Mr. Bechtold operating his aircraft was last fall (2008)," although he does not state whether Bechtold had a passenger on that occasion, nor does he state any dates on which he has seen Bechtold flying with a passenger.

Even assuming that the ordinance prohibits Bechtold's two-seater from flying within Webster, however, the fact that it is not a helicopter, but an ultralight (albeit not an ultralight within the definition in the ordinance) is a material difference between Bechtold and Casciani. It is clear that the Town perceived helicopters to be more of a concern than ultralights, and there is no evidence that, if plaintiff had flown an ultralight-even a two-seater weighing more than 254 pounds-the Town *would* have enforced the ordinance against him. *See Brandt v. Davis*, 191 F.3d

887, 893 (8th Cir. 1999) (plaintiff's allegation that city failed to enforce zoning laws against her neighbor did not show purposeful discrimination against plaintiff for purposes of equal protection claim).

A useful analogy to this case is found in *Gottlieb v. Village of Irvington*, 69 F.Supp.2d 553, 559 (S.D.N.Y. 1999). There, the plaintiff property owners asserted a claim of selective enforcement based on the defendant village's issuance of a stop-work order relating to the plaintiff's construction of a driveway in a location that did not conform to their subdivision plat.

Granting the village's motion for summary judgment, the district court held that the plaintiffs had not shown that they were selectively treated compared with someone similarly situated, based on their allegation that their neighbors' driveway, which had been installed years earlier, was also non-conforming, yet the village had never taken any enforcement action against the neighbors. The court stated that there was no evidence that the village had known of the neighbors' non-conforming driveway location before the driveway was constructed and yet allowed construction to proceed. *Id.* at 559.

"Moreover," the court pointed out,

> even if plaintiffs could prove the Village *did* know at the time the [neighbors] were constructing their driveway that it was nonconforming, that alone would not make out

> an equal protection violation. Failure to proceed against others who are comparably situated is not by itself a basis for finding a denial of equal protection.

Id. (citing *Zahra*, 48 F.3d at 684).

The court added that since the plaintiffs did not allege that they had been discriminated against because of their race or religion, or to prevent them from exercising a constitutional right, plaintiffs were required to show "malicious or bad faith intent by the Village to injure the Plaintiffs." *Id.* Finding such evidence lacking, the court stated that all that the plaintiffs had offered were their subjective feelings that the village "was trying to get them to abandon the building of their dream home," but that they "had no evidence on which to base such feelings. Their suspicions were thus mere speculation." *Id.*

In addition to those defects in plaintiff's selective-enforcement claim, it suffers from yet another flaw. Even assuming that Bechtold could be considered similarly situated to plaintiff, and assuming that he has, on occasion, flown his two-seater in violation of the ordinance, and further assuming that Town officials knew of that fact and yet did nothing to enforce the ordinance against Bechtold, there is no evidence that the ordinance was selectively enforced *against plaintiff*, for the simple reason that there is no evidence that the ordinance has been enforced against him at all. In their Statement of Undisputed Facts (Dkt. #22), defendants

assert that "[t]o date, the Town has taken no enforcement actions with respect to the plaintiff's helicopter ... or helipad .... " *Id.* ¶ 21. Plaintiff does not appear to dispute that assertion. While it may well be that plaintiff has not attempted to fly his helicopter since the ordinance was passed, the fact remains that he has not presented evidence that he has been selectively *treated* compared to other similarly situated persons. The ordinance's enactment and presence "on the books" does not demonstrate selective enforcement, actual or threatened.[9]

By its very nature, a claim of selective enforcement requires actual, or at least threatened, enforcement, or *some* sort of selective "treatment" of the plaintiff, compared to others in similar situations. *See, e.g., Orgain*

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9. If plaintiff had presented evidence that he and Bechtold were both flying their aircraft in Webster at, or close to, the same time on the same day, and that only plaintiff was charged with a violation, he might be able to satisfy this element of a selective-enforcement claim. *See, e.g., Griffin v. City of Heath*, No. 2:04-CV-119, 2006 WL 745294, at *14 (S.D. Ohio Mar. 21, 2006) (finding that African-American plaintiff who presented uncontroverted evidence that he was asked to move his vehicle off the street during a snow emergency while his Caucasian neighbor was not, had presented sufficient evidence to raise a material issue of fact with regard to the discriminatory effect of defendant officers' actions, but going on to find that plaintiff had not presented sufficient evidence to raise a genuine issue of material issue of fact with regard to the discriminatory *purpose* of the officers' actions under the rational-basis test). Since plaintiff has not alleged that the ordinance has ever been enforced against him, however, he cannot make such a showing.

v. City of Salisbury, 305 Fed.Appx. 90, 98 (4th Cir. 2008) (owners of nightclub with predominantly black clientele, who alleged selective enforcement of city nuisance laws, were required at summary judgment stage to proffer evidence that police chief threatened plaintiff with prosecution for violation of the nuisance laws, but did not threaten similarly situated nightclub with predominantly white clientele, because of that difference in the racial composition of their clientele).

Indeed, the Second Circuit has stated that "a showing that the plaintiff was treated differently compared to others similarly situated" is a "prerequisite" and a "threshold matter" to a selective enforcement claim. *Church of the American Knights of the KKK v. Kerik*, 356 F.3d 197, 210 (2d Cir. 2004). *See, e.g., LaTrieste Rest.*, 40 F.3d at 590 (plaintiff business raised issues of triable fact with respect to its selective-enforcement claim, based on evidence that defendant town had never enforced certain zoning ordinance against plaintiff when plaintiff operated as an Italian restaurant and cabaret, but that Town began to enforce ordinance shortly after plaintiff changed to a sports bar/topless cabaret format). *See also Gardenhire v. Schubert*, 205 F.3d 303, 319 (6th Cir. 2000) (plaintiff alleging selective enforcement must demonstrate, *inter alia*, that defendant (1) singled plaintiff out for prosecution and (2) decided not to prosecute other persons in similar situations); *Jennejahn v. Village of Avon*, 575 F.Supp.2d 473, 482-83 (W.D.N.Y. 2008) (selective treatment compared to others similarly situated "is essential to a selective enforcement claim").

Often this is discussed in the case law in terms of Article III standing to sue, also known as the "case or controversy" requirement. *See, e.g., Bronson v. Swensen,* 500 F.3d 1099, 1109 (10th Cir. 2007) (stating that "[p]laintiffs' § 1983 claims for prospective relief based upon Utah's criminal prohibition of polygamy lie closer to the 'no credible threat' [of prosecution] end of the injury-in-fact continuum," since "[p]laintiffs were never charged, prosecuted, or directly threatened with prosecution under" the statute); *San Diego County Gun Rights Committee v. Reno,* 98 F.3d 1121, 1126-27 (9th Cir. 1996) (plaintiffs lacked standing to challenge federal firearms statute, since they "ha[d] not articulated concrete plans to violate" the statute, and "[t]he acts necessary to make plaintiffs' injury-prosecution under the challenged statute-materialize [we]re almost entirely within plaintiffs' own control"); *Davidson v. Culver City,* No. CV04-2220, 2004 WL 5361378, at *14 ("Neither fear nor the mere possibility of discriminatory enforcement creates a concrete cognizable injury in fact required to satisfy Article III's case and controversy requirement for standing") (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555-610 (1992)), *aff'd,* 159 Fed.Appx. 756 (9th Cir. 2005); *Lash v. City of Union,* No. C-3-98-045, 1999 WL 33127974, at *6 (S.D.Ohio Sept. 27, 1999) ("courts have concluded that the plaintiffs did not have standing to assert a selective enforcement claim, when the defendants had not enforced the ordinance in question against them") (citing cases).[10]

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10. I note that although defendants do not appear to have raised standing as a separate ground for their motion, "standing ... is jurisdictional and not subject to waiver." *Lewis v. Casey,* 518 U.S. 343, 349 n. 1 (1996).

Here, there is no evidence—indeed, there is no allegation in the complaint—that plaintiff has ever been sanctioned under the ordinance, or that defendants have otherwise "enforced" the ordinance against him. In the absence of such evidence, a claim of selective enforcement cannot stand. *See Phelps v. Hamilton*, 934 F.Supp. 373, 376 (D.Kan. 1996) ("To infer that plaintiff faces a clear or present danger of unlawful prosecution would require sheer speculation that plaintiff will violate the ... statute in the future and that third persons will likewise do so, but that defendant for unconstitutional reasons will selectively prosecute only plaintiff").

That defect in plaintiff's proof also defeats his claim with respect to the other individual who is alleged to have flown an aircraft within Webster since the ordinance took effect. Plaintiff alleges that Webster resident John Roessell has since 1990 owned a seaplane that he continues to operate, without interference from the Town. Plaintiff has submitted an affidavit from Roessel stating that he "ha[s] been able to take off and land [his] plane with the full knowledge of Webster town officials with no problem, and [that he], along with numerous other aircrafts [sic] owners, continue to do so." Pl. App. vol. II, Ex. F ¶ 18. He also alleges that following the meeting of the Town Board passed the ordinance, Roessel "asked Town of Webster Building Inspector Thomas Pellett how the [sic] affected [Roessel]," and that Pellett responded, "you're ok ... go ahead and land and take off as usual ... no one's gonna give you any problem ... that law's just for Casciani."

Roessel does not state how he knows that his continued operation of his seaplane has occurred with the Town's "full knowledge," nor does he identify the "numerous" other individuals who are currently operating aircraft within Webster, what sort of aircraft they fly, or where they take off and land. As with Bechtold, however, the real problem with this claim is that plaintiff has not shown that the ordinance has been enforced against *him*.

As to Pellett's alleged statement about the ordinance being "just for Casciani," that statement appears to be inadmissible hearsay. Although Pellett was a Town employee, there is no indication in the record that he was authorized to speak about the scope or applicability of the ordinance, *see* F.R.E. 801(d)(2)(C), nor does his statement appear to have related to a matter within the scope of his employment, *see* F.R.E. 801(d)(2)(D).

The ordinance itself does not expressly confer upon any particular official or body primary authority for enforcing its provisions. Section 76-12(A), entitled "Enforcement; penalties for offenses," provides certain penalties for "[a]ny violation of this chapter or of any order, requirement decision or determination issued by the Commissioner of Public Works or his/her agent or designee .... " Subsection (B) also provides that "[i]n addition to the penalties provided above, the Town Board may also institute any appropriate action or proceeding to prevent, correct or restrain any violation of this chapter." Those provisions, then, indicate that the Town Board, and perhaps the Commissioner of

Public Works, have some powers relative to enforcement of the ordinance, but they make no mention of the Building Inspector.[11]

The Town Building Inspector's authority is addressed in Chapter 86. Section 86-10, entitled "Powers and duties of Building Inspector," sets forth various powers and responsibilities of the building inspector relating to "the erection, alteration, removal and demolition of buildings or structures or parts thereof ...," but makes no mention of aircraft, airports, or Chapter 76. There is, then, no apparent basis upon which Pellett's alleged statement would be admissible in this action.

Aside from that, plaintiff has not presented evidence from which one could reasonably conclude that he and Roessel are similarly situated. Although operation of a seaplane within the Town's geographical limits appears to fall with the proscriptions of the ordinance, the simple fact is that a seaplane is significantly different in several respects from a helicopter. Presumably, Roessel's

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11. The provisions dealing generally with the Department of Public Works are contained in Chapter 56 of the Code. The Court takes judicial notice of the Webster Town Code, which is available online via the Town's website, at http://www.ecode360.com/?custId=WE0220. *See Nelson v. City of Rochester*, 492 F.Supp.2d 282, 284 n.1 (W.D.N.Y. 2007) (taking judicial notice of Rochester Municipal Code); *see also* F.R.E. 201(b)(2) (court may take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

seaplane takes off from and lands on the water, some distance from the shore. While taxiing on the water, the plane would be more akin to a boat than to an aircraft in flight. Plaintiff's helicopter, in contrast, takes off from and lands on a concrete helipad that plaintiff constructed on his property. Without passing judgment on which aircraft would be considered more objectionable by the average person, it is indisputable that they look, sound, and behave *differently*, and even if there were evidence—which there is not—that the Town had enforced the ordinance against plaintiff but not against Roessel, those differences render them not similarly situated for purposes of a selective-enforcement claim.

Additionally, there remains the fundamental flaw in plaintiff's proof: the absence of evidence that the ordinance has been enforced against him. Even assuming that plaintiff can get over the obstacle of his seeming lack of Article III standing, he cannot establish a claim of selective enforcement without showing that he has been treated differently from at least one other similarly situated person. *Cobb*, 363 F.3d at 110. By comparing himself to Roessel, and attempting to show differential treatment because Roessel has flown his aircraft since the ordinance was passed and has not been penalized for it, plaintiff has placed himself in the position of having to show, at the very least, that *he* has flown, or attempted to fly, his helicopter, and that he *has* been penalized, or prosecuted, or prevented from flying, by the Town. He has not made such a showing.

Plaintiff's selective-enforcement claim based on § 249 fares no better. Plaintiff alleges that "Webster resident Thad Swift routinely had helicopters land at his" restaurant, Hedges 9 Mile Point ("Hedges") in Webster. Dkt. #3 ¶ 42. In support of that assertion, plaintiff has submitted an affidavit from Swift stating that he is a part owner of Hedges, that "[h]istorically, a variety of aircraft, including helicopters, have regularly landed at the restaurant with incident or provocation from the Town of Webster," and that Hedges "never had to comport with New York General Business Law § 249." Dkt. #14-2 at 50 ¶¶ 3, 5.[12]

Plaintiff alleges, however, that at defendants' request, he withdrew his § 249 application, and there is no evidence that he has ever been penalized in any way

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12. Swift's affidavit was filed by plaintiff in opposition to defendants' Rule 12(b)(6) motion to dismiss (and, since it was outside the pleadings, is one of the reasons why the Court decided to convert the motion to a motion for summary judgment). Plaintiff does not appear to mention Swift or Hedges in his submissions in response to the Court's Rule 12(d) Order, however.

Plaintiff does not appear to allege that helicopters have continued to operate to and from Hedges since the ordinance was passed, nor does he appear to dispute defendants' contention that no such activity has occurred at Hedges in over 20 years. Even assuming the truth of plaintiff's allegations, then, all such activity at Hedges appears to be purely "historical," and to have occurred long before the events giving rise to this lawsuit.

for not obtaining a permit under § 249.[13] The undisputed facts, then, show that plaintiff has not been treated differently from Swift. Although plaintiff has submitted

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13. Plaintiff alleges that the "real reason" why the Town asked him to withdraw his § 249 application was expressed by then-Town Supervisor Cathryn Thomas at an April 2005 Board meeting at which she expressed concern that "[i]f an application [under § 249] is submitted prior to the Town establishing an ordinance [governing private airports] the Town would not have the opportunity to hold the applicant to the ordinance." Pl. App. vol. I, Ex. J at 2.

It would hardly have been unreasonable, however, for the Town to want to hold off on granting any permits for the construction of private airports until after the Town had a chance to draft and enact a comprehensive ordinance dealing with that matter. At worst, this might show that Genese misled plaintiff into thinking that plaintiff would be "grandfathered in" to whatever ordinance was passed, but plaintiff has not articulated any theory under which that would provide a basis for a constitutional claim.

Furthermore, "estoppel will not lie against municipalities." *Coggins v. County of Nassau*, 615 F.Supp.2d 11, 29 n.7 (E.D.N.Y. 2009) (quoting *United States v. Schmitt*, 999 F.Supp. 317, 360 (E.D.N.Y. 1998)); *see also Coney Island Resorts, Inc. v. Giuliani*, 103 F.Supp.2d 645, 657 (E.D.N.Y. 2000) ("equitable estoppel against the government is foreclosed 'in all but the rarest of cases'" and "must be supported by proof that the government's conduct was willful, wanton, or reckless") (quoting *New York State Medical Transporters Ass'n v. Perales*, 77 N.Y.2d 126, 130 (1990)). There is no evidence here that Genese deliberately misled plaintiff about being grandfathered in, particularly since the ordinance was significantly changed from, and made more narrow than, the original draft proposal following the March 2, 2006.

evidence that Swift and Hedges were never required to comply with § 249, the fact is that plaintiff was not required to do so, either. There is no evidence that plaintiff was ever in any way penalized or made to suffer any adverse consequences based on his failure to obtain a § 249 permit.

To the extent that the complaint can be read as attempting to base a selective-enforcement claim on the alleged discriminatory enforcement of the Town's building code provisions concerning other matters unrelated to flying the helicopter, such a claim fails as well. For one thing, plaintiff does not allege that any enforcement action was ever actually taken against him based on his failure to obtain a permit. Plaintiff alleges only that code enforcement officer Winter "threaten[ed] court action for items located at or on [plaintiff's] properties ...," and that Winter sent him a "written notice ... indicating that [plaintiff's use of a helicopter landing pad] was not an 'enumerated use' of the Webster Town Code." Casciani Aff. (Dkt. #26-9) ¶¶ 49, 50. Thus, there never was any actual "enforcement" of those provisions against plaintiff.

In addition, there is no basis for imposing liability on the Town or Nesbitt for Winter's actions. Plaintiff has neither alleged nor presented facts suggesting that Winter's "admoni[tions]" to him about storing unregistered vehicles on his property and the like were issued pursuant to an official policy or custom of the Town. *See Monell v. New York City Dep't of Soc. Serv.*, 436 U.S. 658, 691 (1978). In short, there is no evidence

that Winter acted pursuant to any Town policy, and his actions—which apparently never went beyond "admonitions"—would not give rise to a § 1983 claim in any event. *See Aguilera v. County of Nassau*, 425 F.Supp.2d 320, 324 (E.D.N.Y. 2006) (dismissing complaint where there were no "no facts from which it can be inferred, even circumstantially, that a County custom or policy ... was the driving force of the plaintiff's alleged constitutional violation"); *Curto v. Bender*, No. 04-CV-26, 2005 WL 724156, at *11 (W.D.N.Y. 2005) (dismissing § 1983 claim against county based on failure to allege facts showing that acts complained of were taken pursuant to county policy), *aff'd*, 231 Fed.Appx. 93 (2d Cir. 2007); *see also Rasche v. Village of Beecher*, 336 F.3d 588, 600 (7th Cir. 2003) (village code enforcement officer was "certainly not the person with final policymaking authority" for the village, as she "occupied a position quite analogous to a police officer making an arrest").

I also note that there is no evidence that defendants acted out of any "impermissible considerations such as race, religion, [or] intent to inhibit or punish the exercise of constitutional rights .... " *Bizzarro*, 394 F.3d at 86. Plaintiff, who is of Italian descent, has alleged that defendants singled him out "based on the Plaintiff's national origin and ancestry," Amended Complaint ¶ 1, but as discussed in more detail below in the context of plaintiff's "national origin" claim, the evidence fails to support that allegation.

Aside from that, plaintiff's allegations might, at most, suggest that defendants acted out of a "malicious

or bad faith intent to injure" plaintiff. *Bizzarro*, 394 F.3d at 86. The facts in the record, however, show only that the dispute over plaintiff's helicopter was the eventual *cause* of some hard feelings between him and Town officials, not the other way around.

As the Second Circuit observed in *Bizzarro*, "cases predicating constitutional violations on selective treatment motivated by ill-will, rather than by protected-class status or an intent to inhibit the exercise of constitutional rights, are 'lodged in a murky corner of equal protection law in which there are surprisingly few cases and no clearly delineated rules to apply.'" *Id.* (quoting *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981)). The court in *Bizzarro* also noted that although it had "frequently referred to the *LeClair* formulation ..., often in the zoning context," the court had "rarely ... found a constitutional violation" under that standard. *Id. See also LeClair*, 627 F.2d at 610-11 (finding no constitutional violation in case involving dairy farmer who alleged that defendant milk inspector had maliciously denied him a license to ship milk out of state, where, after scouring the record for evidence of malicious or bad faith intent to injure the plaintiff, court found none beyond the fact that the farm inspector "was in a spiteful mood").

To the extent that the evidence shows any malice toward plaintiff on the part of Nesbitt or other Town officials, that same evidence shows that whatever ill will existed between plaintiff and defendants sprang from plaintiff's operation of his helicopter and his resistance

to the Town's efforts to rein in that operation. In other words, even when the evidence is viewed in the light most favorable to plaintiff, all that it shows is that the dispute over plaintiff's helicopter may have escalated to the point where some antagonism eventually developed between plaintiff and Town officials, but the dispute was not caused by any preexisting animus toward plaintiff. Indeed, plaintiff alleges that in October 2005, Nesbitt (who was then a Board member and had not yet been elected supervisor) visited plaintiff's property, and, after seeing where plaintiff proposed building a helipad, said to plaintiff, "Who could have a problem with this? I don't have a problem with this." Plaintiff's Aff. ¶ 115. That hardly bespeaks some preexisting animus toward plaintiff on Nesbitt's part. *See Jercich v. County of Merced*, No. 1:06-CV-00232, 2006 WL 3747184, at *10 (E.D. Cal. Dec. 19, 2006) (dismissing selective-enforcement claim and noting that "the facts do not show a history of conflict between Jercich and the County Defendants," which tended to show that defendants did not act out of malice toward plaintiff).

Plaintiff's selective-enforcement claim against Nesbitt also fails for lack of evidence of Nesbitt's personal involvement in any enforcement actions. To make out a valid § 1983 claim against an individual defendant, a plaintiff must allege the defendant's personal involvement in the constitutional violation. *Liner v. Goord*, 582 F.Supp.2d 431, 433 (W.D.N.Y. 2008) (citing *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 254 (2d Cir. 2001), and *Gaston v. Coughlin*, 249 F.3d 156, 164 (2d Cir. 2001)). There is no evidence

that Nesbitt was involved in Winter's alleged acts concerning code violations by plaintiff. *See Miller v. Bailley*, No. 05-CV-5493, 2008 WL 1787692, at *8 (E.D.N.Y. Apr. 17, 2008).

Even if plaintiff could show some selective treatment, then, this claim would fail for lack of evidence of some improper motivation. In *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12 (2d Cir. 1999), for example, the Second Circuit held that the plaintiff business had failed to demonstrate the existence of an issue of material fact with respect to its claim that the defendant town had selectively enforced an ordinance regarding commercial signage, based on one instance of the town's apparent failure to enforce the ordinance against another property owner. The court stated that regardless of whether that one instance alone created a material issue of fact as to selective treatment of those similarly situated, the plaintiff "ha[d] failed to show a material issue of fact as to the key issue in an equal protection claim alleging selective enforcement-impermissible motive." *Id.* at 17. As to that issue, the court stated, the plaintiff's "assertion that the Town enforced the ordinance against it with an impermissible motivation [wa]s sheer 'conjecture and speculation' that [wa]s insufficient to withstand the Town's motion for summary judgment") (quoting *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998)). *See also Jennejahn v. Village of Avon*, 575 F.Supp.2d 473, 483 (W.D.N.Y. 2008) (stating that plaintiff's "contention that he was singled out for unfavorable treatment because [of third party's political influence [wa]s purely speculative and not grounded in

any facts reasonably supporting his theory," and that plaintiff's "self-serving and conclusory allegations of political influence [we]re insufficient to establish a claim for selective prosecution, or the existence of a material issue of fact concerning the same"); *Jercich*, 2006 WL 3747184, at *10 (dismissing selective-prosecution claim where plaintiff's "complaint does not allege an irrational motive or animus [for defendants' alleged enforcement of code against him but not against his neighbors], other than conclusory conspiracy claims"); *Hi Pockets, Inc. v. Music Conservatory of Westchester, Inc.*, 192 F.Supp.2d 143, 158 (S.D.N.Y. 2002) (granting defendants' motion for summary judgment as to plaintiff's equal protection claim alleging that defendants had selectively granted building permits on the basis of political motives, where plaintiff failed to demonstrate that discrimination was based on impermissible factor or that defendants intended to cause injury to plaintiff).

2. Class-of-One Claim

In *Olech*, the Supreme Court reaffirmed the existence of "successful equal protection claims brought by a 'class of one' .... " 528 U.S. at 564. "Unlike [a] selective prosecution claim, [an] *Olech*-based equal protection claim is not dependent on [the plaintiff's] ability to prove that [he was treated differently] for an *impermissible* reason," such as his race or political affiliation. *Cobb*, 363 F.3d at 110 (emphasis added). "Rather, under *Olech*, the plaintiff[] can recover if [he] can show that [he was] treated differently from similarly situated [persons], ... and that there was 'no rational

basis for the difference in treatment.'" *Id.* (quoting *Olech*, 528 U.S. at 564). *See also United States v. Moore*, 543 F.3d 891, 896 (7th Cir. 2008) ("a class-of-one equal protection challenge asserts that an individual has been irrationally singled out, without regard for any group affiliation, for discriminatory treatment") (internal quotation marks omitted); *Prestopnik v. Whelan*, 249 Fed.Appx. 210, 213 (2d Cir. 2007) (noting that "*Olech* might be read to eliminate any requirement of malice or bad faith in 'class of one' cases").

A class-of-one plaintiff must therefore demonstrate the existence of persons in circumstances similar to his own, who received more favorable treatment than the plaintiff, for no rational reason. *See Neilson v. D'Angelis*, 409 F.3d 100, 105 (2d Cir. 2005), *overruled on other grounds by Appel v. Spiridon*, 531 F.3d 138, 139-40 (2d Cir. 2008); *Balakrishnan*, 2009 WL 1291755, at *5. In addition, the Supreme Court in *Engquist v. Oregon Dep't of Agriculture*, __ U.S. __, 128 S.Ct. 2146 (2008), added an additional element, holding that a class-of-one plaintiff must show that the difference in treatment resulted from non-discretionary state action. *See id.* at 2154; *Balakrishnan*, 2009 WL 1291755, at *5. The Court in *Engquist* reasoned that "[t]here are some forms of state action ... which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments," and that "[i]n such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Id.*

"Although the Court in *Engquist* noted that '[t]his principle applies most clearly in the employment context,' *id.*, numerous courts have applied Engquist to bar 'class of one' claims in connection with discretionary decisions made outside the government-employee context." *Seymour's Boatyard, Inc. v. Town of Huntington*, No. 08-CV-3248, 2009 WL 1514610, at *7 (S.D.N.Y. June 1, 2009); *accord Crippen v. Town of Hempstead*, No. 07-CV-3478, 2009 WL 803117, at *6 (E.D.N.Y. Mar. 25, 2009). *See, e.g., Flowers v. City of Minneapolis*, 558 F.3d 794, 799 (8th Cir. 2009) (applying *Engquist* to a "police officer's decisions regarding whom to investigate and how to investigate"); *Moore*, 543 F.3d at 901 ("a class-of-one equal protection challenge, at least where premised solely on arbitrariness/irrationality, is just as much a 'poor fit' in the prosecutorial discretion context as in the public employment context"); *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008) (applying reasoning of *Engquist* to government-contractor relationship); *Tarantino*, 615 F.Supp.2d at 117 (applying *Engquist* to case involving city ordinance regulating rental properties). *See also Marino Shoreham-Wading River Central School Dist.*, No. CV-08-0825, 2008 WL 5068639, at *7 (E.D.N.Y. Nov. 20, 2008) ("The *Engquist* holding has been applied by courts to any discretionary determination by decisionmakers, even outside the public employment context"). To withstand defendants' motion for summary judgment on this claim, therefore, Casciani must show that there are genuine issues of fact as to each of those elements. *Ferguson v. City of Rochester School Dist.*, 485 F.Supp.2d 256, 260 (W.D.N.Y. 2007).

With respect to the existence of similarly situated persons, the standard of proof is even higher on a class-of-one claim than it is on a selective-enforcement claim. The Second Circuit has held that "a class-of-one plaintiff must show, among other things, an 'extremely high degree of similarity between [himself] and the persons to whom [he] compares [himself]' in order to succeed on an equal protection claim." *Doninger v. Niehoff*, 527 F.3d 41, 53 (2d Cir. 2008) (quoting *Clubside*, 468 F.3d at 159). Indeed, the plaintiff and his comparators must be "*prima facie* identical in all relevant respects." *Neilson*, 409 F.3d at 104 (citation and quotation marks omitted). *See, e.g., Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002) (comparator residential developments were not *prima facie* similar because, for example, one did not have the same layout and another did not seek the same variances from the planning board) (cited in *Clubside*, 468 F.3d at 160); *Tarantino*, 615 F.Supp.2d at 113-14 (plaintiff landlord was not similarly situated to other landlords with respect to City of Hornell's residency requirement, since "the other landlords all resided, if not in Hornell proper, at least in the immediate area," whereas plaintiff lived "a considerable distance from Hornell").

The court has also made clear that "[t]his showing is more stringent than that used at the summary judgment stage in the employment discrimination context." *Clubside*, 468 F.3d at 159. The reason, the court stated, is that "'the existence of persons in similar circumstances who received more favorable treatment than the plaintiff in a class-of-one case 'is offered to

provide an inference that the plaintiff was intentionally singled out for reasons that so lack any reasonable nexus with a legitimate governmental policy that an improper purpose—whether personal or otherwise—is all but certain." *Id.* (quoting *Neilson*, 409 F.3d at 105). As another district court from this circuit has explained, "in the absence of differing treatment based upon a plaintiff's protected class or the exercise of his or her fundamental constitutional rights, more weight is shifted to the first prong of a class of one equal protection claim to counterbalance the lesser showing needed to satisfy the second prong." *Osborne v. Fernandez*, No. 06-CV-4127, 2009 WL 884697, at *40 (S.D.N.Y. Mar. 31, 2009) (adding that "[l]ike all questions of fact, should a plaintiff fail to establish a genuine issue of material fact on this element of his or her claim, a court may grant a defendant's motion for summary judgment dismissing this claim") (citing *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 790-91 (2d Cir. 2007)).

To defeat defendants' summary judgment motion, then, plaintiff "has an affirmative duty to present evidence establishing a *prima facie* case that would allow a reasonable jury to find that his position was identical in all material aspects to the position of those to which he compares himself." *Kasprzycki v. DiCarlo*, 584 F.Supp.2d 470, 477 (D.Conn. 2008) (citing *Neilson*, 409 F.3d at 105). *See also Maulding Development*, 453 F.3d at 971 (stating that "[t]o survive summary judgment [on his class-of-one claim], it is Maulding's burden to produce evidence showing a dispute of material fact," and finding that plaintiff failed to do so

as to the similarly-situated requirement). *See also Vassallo*, 591 F.Supp.2d at 190 ("[T]he Second Circuit has left no doubt that a [class of one] plaintiff must meet a high threshold to move beyond summary judgment") (quoting *Pina v. Lantz*, 495 F.Supp.2d 290, 304 (D.Conn. 2007)).

The Court has already discussed plaintiff's alleged comparators in connection with his selective-enforcement claim, and will not repeat that discussion here. Suffice it to say that since plaintiff's showing was insufficient to withstand defendants' motion for summary judgment as to his selective-enforcement claim, his class-of-one claim falters on this ground as well.

In addition, plaintiff has also failed to show any non-discretionary acts by defendants, and his purported class-of-one claim is therefore barred under the reasoning of *Engquist*. Prior to the enactment of the ordinance, there was no law that specifically addressed the operation of aircraft within Webster, other than a state statute of general application—§ 249—which prohibited the operation of an "airport" within a town anywhere in the state without approval from the town's governing body. There were no written criteria, then, for determining whether the operation of any particular aircraft within Webster constituted a problem that needed to be addressed, and any actions taken by the Town in that regard were entirely discretionary.[14]

14. In addition, to the extent that plaintiff alleges "harassment" or similar acts by the Town prior to the passage (Cont'd)

Even after the ordinance was passed, any action taken by the Town to enforce the ordinance was necessarily discretionary.[15] In *Engquist*, the Court used the following illustration of actions that "by their nature involve discretionary decisionmaking":

> Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others,

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(Cont'd)
of the ordinance, most of those acts fall outside the three-year statute of limitations applicable to § 1983 claims. *See Harris v. City of New York*, 186 F.3d 243 (2d Cir. 1999). The complaint in this case was filed on April 29, 2008. *See also Dennis v. Local 804*, No. 07 CIV. 9754, 2009 WL 1473484, at *3 n.3 (S.D.N.Y. May 27, 2009) ("Courts may dismiss a claim as time-barred *sua sponte* where ... it is clear that the applicable statute of limitations has run")(citing *Leonhard v. United States*, 633 F.2d 599, 609 n. 11 (2d Cir. 1980), *cert. denied*, 461 U.S. 908 (1981)). That alleged "harassment," which consisted of nothing more than various notices, warnings, and unfulfilled threats of unspecified "court action," *see* Plaintiff's Rule 56.1 Counter Statement ¶¶ 54, 55, does not give rise to a § 1983 claim in any event, however.

15. As stated, there is no evidence that defendants *have* taken any action to enforce the ordinance against plaintiff. I mention this only to point out that to the extent that plaintiff, despite that lack of evidence, attempts to allege that he has been irrationally singled out for enforcement of the ordinance, such a claim would be barred by *Engquist*.

> even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.

128 S.Ct. at 2154. *See also Tarantino*, 615 F.Supp.2d at 117 & n. 11 (applying *Engquist* to enforcement of town code provisions because of the degree of discretion involved); *Nasca v. Town of Brookhaven*, No. 05-CV-122, 2008 WL 4426906, at *11 n.4 (E.D.N.Y. Sept. 25, 2008) ("to the extent plaintiff is challenging the discretionary decisions by the Town as to the enforcement of its permit laws and code provisions, *Engquist* suggests that 'class of one' challenges cannot be asserted as to such decisions"); *Sloup*, 2008 WL 3978208, at *17 (*Engquist* rule "would preclude a class of one claim" based on allegation that town's enforcement of town code provision requiring removal of any "menace to navigation" within town waters, "because such a determination is clearly discretionary"); *Occhionero v. City of Fresno*, No. 05-1184, 2008 WL 2690431, at *9 (E.D.Cal. July 3, 2008) (stating that court would "heed[] the warning of ... the U.S. Supreme Court's observation in *Engquist* as to undermining discretion," and would not allow plaintiff to proceed on a "class-of-one equal protection claim ... to permit second guessing of the City's code enforcement measures at issue here").

Finally, to the extent that the complaint can be read as asserting a class-of-one claim based on the passage—

as opposed to the enforcement—of the ordinance, such a claim is tantamount to a facial challenge to the ordinance, and fails for the reasons already stated with respect to that challenge. Even if, as a practical matter, plaintiff is the only person who is currently affected by the ordinance, or even if the ordinance was enacted in direct response to plaintiff's operation of his helicopter, that does not give rise to a constitutional claim, as long as the ordinance is facially neutral and is not being applied in a discriminatory manner. *Flying J*, 549 F.3d at 547; *Pro-Eco*, 57 F.3d at 515; *F.O.P. Hobart*, 864 F.2d at 556. *See also Bass River Associates v. Mayor, Twp. Comm'r, Planning Bd. of Bass River Twp.*, 743 F.2d 159, 161, 166 (3d Cir. 1984) (affirming dismissal of equal protection challenge to ordinance where appellants were the only persons adversely affected by ordinance when it was enacted); *Sag Harbor Port Assocs.*, 21 F.Supp.2d at 185 (although plaintiff, who sought to build tennis club on its property, was the only property owner affected by ordinance prohibiting issuance of special use permits for building of tennis clubs, plaintiff could not establish how the ordinance "targeted" the plaintiff, since on its face the ordinance applied to every property owner in the plaintiff's district).[16]

16. Although the ordinance itself draws a distinction between ultralight and non-ultralight aircraft, that distinction cannot support Casciani's class of one claim because, as explained earlier, there is a rational basis for the ordinance and such distinctions.

D. First Amendment Retaliation Claim

Casciani alleges that defendants violated his First Amendment rights by retaliating against him for having spoken out about the ordinance as it was originally drafted. Specifically, plaintiff contends that after he complained about the proposed ordinance, the Town withdrew it and passed the current, more stringent ordinance, which bans almost all private aircraft, including plaintiff's helicopter, from operating within Webster.

"[T]he Second Circuit has 'described the elements of a First Amendment retaliation claim in several ways, depending on the factual context.'" *Sloup,* 2008 WL 3988208, at *22 (quoting *Williams v. Town of Greenburgh,* 535 F.3d 71, 76 (2d Cir. 2008)). Where a private citizen asserts a First Amendment claim against a public official, the plaintiff must demonstrate that: (1) the plaintiff engaged in speech or conduct protected by the First Amendment; (2) defendants' actions were motivated by the exercise of plaintiff's First Amendment rights; and (3) defendants' actions effectively chilled plaintiff's exercise of those rights. *See Williams,* 535 F.3d at 76 (citing *Curley v. Village of Suffern,* 268 F.3d 65, 73 (2d Cir. 2001)); *Sloup,* 2008 WL 3988208, at *22; *Moran v. City of New Rochelle,* 346 F.Supp.2d 507, 517 (S.D.N.Y. 2004).

According to the complaint, defendants "retaliated" against him for having opposed the proposed ordinance by withdrawing that proposal and instead enacting a

more draconian ordinance that simply banned virtually all private aircraft from operating within Webster. *See* Dkt. #3 ¶¶ 70-74. Plaintiff also alleges that defendants thereby reneged on their alleged "promise to 'grandfather in' Plaintiff's use and landing of his helicopter in the Town of Webster ... ." Amended Complaint ¶ 91.

There is no dispute here that, by publicly opposing the proposed ordinance, plaintiff engaged in protected activity. *See Velez v. Levey,* 401 F.3d 75, 97 (2d Cir. 2005) ("speech critical of the exercise of the State's power lies at the very center of the First Amendment"); *Bennett v. Hendrix,* 423 F.3d 1247, 1255-56 (11th Cir. 2005) (police officers could not lawfully retaliate against private citizens for having sponsored a voter referendum that was opposed by the officers), *cert. denied,* 549 U.S. 809 (2006); *Jenkins v. Schwarzenegger,* No. CIV S-04-2520, 2006 WL 2620446, at *2 (E.D.Cal. Sept. 12, 2006) (noting that an individual "has a First Amendment right to voice his opinion about proposed legislation"); *Mack v. Alabama Dep't of Human Resources,* 201 F.Supp.2d 1196, 1209 (M.D.Ala. 2002) (plaintiff's letter to state department of human resources director voicing her opposition to certain proposed legislation constituted speech about a matter of public concern for purposes of First Amendment analysis).

What is missing here, however, is an allegation or evidence of unlawful retaliation. That Nesbitt or the Board members, by passing the revised, more restrictive ordinance, may have acted, in part, in response or

reaction to plaintiff's various objections to the earlier proposed ordinance does not mean that their passage of the ordinance—which is facially neutral and valid—amounts to unconstitutional retaliation. To hold otherwise would eviscerate the rule against "looking behind" facially valid legislation, and would allow plaintiff to circumvent that rule by dressing his claim in First Amendment clothing.

In *F.O.P. Hobart*, for example, Seventh Circuit held that the plaintiff police officers had failed to state a First Amendment claim against certain city council members based on the officers' allegation that, out of retaliation for the officers' support of the council members' victorious opponents in a city council election, the lame-duck council members had passed an ordinance (which the police officers had opposed) requiring all city workers, including the police, to work an average of forty hours per week. In so ruling, the court stated that on its face, the ordinance "*appear[ed]* to be an utterly commonplace personnel regulation," and that even if the council members had been motivated by a desire to punish the officers for having opposed their reelection, that would not violate the Constitution, since the First Amendment "does not outlaw the interest-group state," nor does it "purge politics from politics." 864 F.2d at 554 (Posner, J.). Likewise, that Nesbitt and the Board members in this case may have enacted an ordinance that was stricter than the original draft, even if they did so partly because of the many objections that plaintiff had raised to that draft proposal, that does not support a finding that they retaliated against plaintiff for having

exercised his First Amendment rights. All it shows is that they responded to plaintiff's laundry list of objections by passing an ordinance that was more sweeping in its scope, but also simpler and less subject to what they may have seen as nitpicking criticisms.

In addition, in cases "involving criticism of public officials by private citizens," the Second Circuit has "impose[d] an actual chill requirement for First Amendment retaliation claims," *i.e.*, a requirement that the plaintiff allege and ultimately prove an "actual chill" of his First Amendment rights. *Gill v. Pidlypchak*, 389 F.3d 379, 381 (2d Cir. 2004) (citing *Spear v. Town of West Hartford*, 954 F.2d 63, 68 (2d Cir.), *cert. denied*, 506 U.S. 819 (1992)); *see also Curley*, 268 F.3d at 73 ("plaintiff must show, with respect to the third element, that his First Amendment rights were actually chilled") (internal quotation marks omitted).

To establish that element, it is not enough for plaintiff simply to show that he changed his behavior in some way, such as by no longer flying his helicopter; he must show that defendants intended to, and did, prevent or deter him from exercising his rights under the First Amendment. *See, e.g., Greenwich Citizens Committee, Inc. v. Counties of Warren and Washington Indus. Dev. Agency*, 77 F.3d 26, 31 (2d Cir. 1996) (to establish First Amendment retaliation claim, plaintiffs must show that defendants acted "with the purpose of deterring the exercise of First Amendment freedoms"); *Wolff v. Town of Mount Pleasant*, No. 06 CIV. 3864, 2009 WL 1468691, at *6 (S.D.N.Y. Apr. 27, 2009) ("In order to maintain a

First Amendment retaliation claim, a private citizen complainant must allege that the defendant took some action in response to his or her First Amendment activity that 'effectively chilled the exercise of his First Amendment right") (quoting *Williams*, 535 F.3d at 76); *see also Nike, Inc. v. Kasky*, 539 U.S. 654, 683 (2003) ("chilling effect" means that the plaintiff or other potential speakers, "out of reasonable caution or even an excess of caution, may censor their own expression well beyond what the law may constitutionally demand") (Breyer, J., dissenting from dismissal of writ of certiorari). Plaintiff has not made such a showing.[17]

17. To the extent that this claim is asserted against Nesbitt in his individual capacity, it is also barred by the doctrine of absolute legislative immunity, which "attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott Harris*, 523 U.S. 44, 54 (1997). Pursuant to this doctrine, "[l]ocal legislators, such as members of a town board, are absolutely immune from civil rights lawsuits provided that the actions for which they are being sued are 'legislative.'" *Livant v. Clifton*, 334 F.Supp.2d 321, 326 (E.D.N.Y. 2004) (town board's actions in holding a hearing, voting, and approving a resolution which authorized the removal of a nuisance were "clearly legislative in nature," and town board members were absolutely immune from liability for such actions) (citing *Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 210 (2d Cir. 2003)), *aff'd*, 272 Fed.Appx. 113 (2d Cir. 2008); *see also Jemal's Fairfield Farms, LLC v. Prince George's County*, 319 F.Supp.2d 618, 632 (D.Md. 2004) (stating that "[i]t is well established that members of local governmental bodies are entitled to absolute legislative immunity from claims against them arising out of their actions in a legislative capacity," and that "[t]he actions of proposing, discussing, and voting on proposed legislation fall within the ambit of legislative actions") (internal quotation marks and citations omitted).

Here, even when all reasonable inferences are drawn in plaintiff's favor, it is clear that the only thing that the ordinance "chilled" was plaintiff's use of his helicopter. Nothing in the evidence suggests that plaintiff's right to complain or speak out has been chilled by the enactment of the ordinance or by anything else that defendants did. *See Spear*, 954 F.2d at 67 ("Spear's naked assertion of a chill does not suffice to defeat a Rule 12(b)(6) motion"); *see also Colombo v. O'Connell*, 310 F.3d 115, 117 (2d Cir. 2002) (affirming summary judgment for defendant on First Amendment claim, but indicating that plaintiff had failed even to state a valid claim because she had "alleged no actual affect on the exercise of her First Amendment rights at all"), *cert. denied*, 538 U.S. 961 (2003); *Griffin-Nolan v. Providence Wash. Ins. Co.*, No. 504CV1453, 2005 WL 1460424, at *8 (N.D.N.Y. June 20, 2005) (dismissing First Amendment claim on ground that "Plaintiff ha[d] not alleged that Defendants' actions effectively chilled him from filing a complaint"). Accordingly, plaintiff's First Amendment retaliation claim must be dismissed.[18]

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18. I recognize that there is authority that "where the retaliation is alleged to have caused an injury separate from any chilling effect, such as a job loss or demotion, an allegation as to a chilling effect is not necessary to state a claim." *Puckett v. City of Glen Cove*, 631 F.Supp.2d 226, 239 (E.D.N.Y. 2009) (citing *Morrison v. Johnson*, 429 F.3d 48, 51 (2d Cir. 2005)). No such independent injury has been shown here, however. The mere fact that, by virtue of the Town's exercise of its police power, plaintiff is no longer able to fly his helicopter to and from his private property, may not have been to his liking, but it is not, in my view, an "injury" cognizable under § 1983. *See*

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E. National Origin, § 1981, § 1985 and § 1986 Claims

In addition to his selective-enforcement and class-of-one claims, plaintiff purports to assert an equal protection claim alleging unlawful discrimination based on his Italian ancestry. The "Preliminary Statement" of the amended complaint states, *inter alia,* that plaintiff alleges that his equal protection rights have been denied "based on the Plaintiff's national origin and ancestry pursuant to 42 U.S.C. § 1981, and for retaliation under that statute as well." Dkt. #3 ¶ 1. The jurisdictional statement also states that this action is brought not only under § 1983, but also under § 1985(3) and § 1986. Neither § 1981, § 1985, nor § 1986 appears to be mentioned elsewhere in the complaint, however.

As to the reference to national-origin discrimination, the complaint alleges only that: (1) "the Town of Webster

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Gill, 389 F.3d at 383 (standing to sue "is no issue whenever the plaintiff has clearly alleged a *concrete harm* independent of First Amendment chilling") (emphasis added); *see also Smith v. Maypes-Rhynders,* No. 07 Civ. 11241, 2009 WL 874439, at *4 (S.D.N.Y. Mar. 31, 2009) (inmate may state First Amendment claim by alleging either that his exercise of his First Amendment rights has been chilled, or a *"serious injury* that is independent of a possible First Amendment chill") (citing *Gill,* 389 F.3d at 380-84) (emphasis added); *Free Speech v. Reno,* No. 98 CIV. 2680, 1999 WL 147743, at *3-*4 (S.D.N.Y. Mar. 18, 1999) (absent showing of actual chill of First Amendment rights, plaintiff must show an "injury in fact," *i.e.,* deprivation of a legally protected interest).

has an established pattern of discriminating against Italian Americans, particularly in the use of their property in the Town of Webster, and its official's [sic] have referred to Italian Americans and 'dagos,' 'wops' and 'criminals,'" Dkt. #3 ¶ 17; (2) Town attorney Genese told plaintiff that "there [we]re those who believe[d]" that plaintiff's operation of his helicopter was unlawful, including then-supervisor Cathryn Thomas, plaintiff's neighbor Joe Oster (whom plaintiff describes as Thomas's "former lover, ... who made his dislike of Italians well known to the Plaintiff," Dkt. #3 ¶ 36); and (3) "Town of Webster residents of non-Italian descent were able to operate and land aircraft in the Town of Webster, without prohibition," Dkt. #3 ¶ 40. None of the individual causes of action explicitly asserts a claim of national-origin discrimination, nor do they cite § § 1981, 1985 or 1986.

Given these scant references to national origin or ancestry in the complaint, it might seem unclear whether plaintiff actually intends to pursue such a claim. It appears that he does, however, because in his supplemental filings in response to the Court's Rule 12(d) Order, plaintiff has submitted several affidavits from other Webster residents that purport to support plaintiff's contention that he has been discriminated against based on his Italian ancestry. Those affidavits fail utterly in their intended purpose, however.

The first affidavit is that of Anthony Casciani, who has been the Town of Webster Planning Board Chairman for over three decades, and who is apparently plaintiff's

father.[19] Anthony Casciani states in that affidavit that "[f]rom [his] experiences in the Town of Webster, it is clear that certain Town officials and community members have a disdain and dislike for the Plaintiff because he is an Italian American." Plaintiff's Appendix of Exhibits ("Pl. App.") vol. II, Ex. A ¶ 4.

The remainder of Anthony Casciani's affidavit, however, provides zero facts to support that assertion. He simply repeats and rephrases, several times, his basic, conclusory allegation that defendants are prejudiced against Italian Americans, and that their actions toward plaintiff have been motivated by discriminatory animus, but he presents not a shred of evidence to back up that very serious allegation.

In another affidavit, Michael Collichio, a self-described "Italian American and a Town of Webster business owner," states that he too has "experienced the selective enforcement of the Webster Town Codes by the Town of Webster and its officials because [he is] Italian American, because [he is] closely associated with other Italian Americans, and because [he has] opposed the Town's treatment of [himself] on that basis." Pl. App. vol. II, Ex. D ¶ 5. Collichio goes on to relate that he has

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19. One of the exhibits submitted by plaintiff is a copy of an essay written by defendant Nesbitt and published in the *Webster Post* newspaper on June 4, 2008, in which Nesbitt states that plaintiff's "father, Tony Casciani, has been a member [of the Town Board] for many years ... . " *See* Plaintiff's Appendix of Exhibits vol. I, Ex. X. Plaintiff does not appear to deny that assertion.

been the victim of harassment at the hands of Town officials stemming from Collichio's attempts to develop certain property that he owned in 1999. *Id.* ¶ 6. Collichio filed his own federal civil rights suit against the Town in 2001, which was settled in 2004. Collichio states in his affidavit submitted in this action that he is "100% confidential [sic] that if [he] did not bring that case to federal court the Town would have continued to harass [him] because [he is] Italian." *Id.* ¶ 53.

In a third affidavit, Thomas D'Amico, who states that he "was the former Assistant Building Inspector from 4/1988 [and] then became the acting Building Inspector for the Town of Webster until 8/1993" (in other words, years before any of the relevant events here occurred), claims to have "witnessed [during his tenure in those positions] that certain Italian American residents of the Town of Webster were treated differently and were 'picked on' by Town officials due to their open dislike of Italian Americans." Pl. App. vol. II, Ex. B ¶ 3. D'Amico goes on to state that he "heard from various sources that the Town just hates Italians, and sentiments such a 'this town, Italians, Italians, and what do we do? Nothing.'" *Id.* ¶ 4.

Although the remainder of D'Amico's allegations are no more probative of discrimination against plaintiff than the two statements quoted above, they are worth quoting further, if only to show how insubstantial they are. D'Amico states that he "knew of one official who served on the Town Board [who] could not stand Italians." *Id.* ¶ 5. That person, whom D'Amico identifies

by name, does not appear to have been a Board member at the time of the events giving rise to this lawsuit or to have had anything to do with this case. D'Amico also states that the Board's "dislike for certain individuals would show up in zoning decisions," in the sense that the Board would make such decisions "based on whether they liked you or not," and "on the basis of who they liked and did not .... " *Id.* ¶¶ 6-7. D'Amico does not state, or provide any evidence, though, that "who they liked and did not" had any correlation with national origin, ethnicity, or any other protected characteristic.

Once again equating the physical weight of his submissions with evidentiary weight, plaintiff has also submitted excerpts from deposition testimony that D'Amico gave in Collichio's civil rights action. During his testimony, D'Amico stated, *inter alia*, "I can't prove it, but I have a feeling that they're [*i.e.* the Town] picking on" Collichio. Pl. App. vol. I Ex B at 71. This colloquy followed:

> Q. It is possible that they're picking on him because he's Italian?
>
> * * *
>
> A. Is it possible? It could be possible.
>
> I mean, I've heard things that—at the coffee shop about the Town disliking Italians.
>
> Q. Like what?
>
> * * *

Appendix B

A. Just that the Town—they just hate Italians.

> I know one on the Board—as a matter of fact, a friend of mine, ... his ex-wife, her uncle was on the Board, ... [her uncle] can't stand Italians, and that was ... from him through her that he just hates 'em.
>
> ***
>
> That's what I heard, you know, and just through sitting around through the years you hear things, and—you know, "This Town, Italians, Italians, and what do we do? Nothing."

Pl. App. vol. I Ex. B at 71-72. According to plaintiff, this testimony—consisting of D'Amico's "feelings," which by his own admission he could not prove, triple hearsay involving persons who have no connection with Casciani's case,[20] and grumblings that D'Amico had "heard ... at the coffee shop" — "confirms" the Town's animus against Italian-Americans. Casciani Aff. (Dkt. #26-9) ¶ 9.[21]

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20. The "uncle" of the ex-wife of a friend of D'Amico, whom D'Amico identified by name, does not appear to have been on the Board at the time that the ordinance at issue in the case at bar was passed.

21. In support of his allegation that the Town discriminates against Italian Americans, plaintiff also cites a fourth affidavit, that of Angelo Arcoleo. *See* Plaintiff's Mem. of Law (Dkt. #26-8) at 4. Arcoleo's affidavit, however, says nothing at all about such discrimination. *See* Pl. App. vol. II, Ex. C.

These affidavits do not add one iota of admissible evidence in support of plaintiff's claim of national-origin discrimination. They simply amount to a piling up of hearsay, the affiants' subjective beliefs, and naked allegations, unsupported by any facts, of a generalized animus on the part of the Town against Italian Americans. Conclusory allegations do not cease to be conclusory simply by being repeated by multiple people, however. *JWK Int'l Corp. v. United States*, 52 Fed.Cl. 650, 663 (Fed.Cl. 2002) ("conclusory allegations ... become no less conclusory by repetition").[22]

Plaintiff also repeatedly alleges that his neighbor Oster, who, in letters to Town officials and in person at Board meetings, opposed plaintiff's operation of a helicopter and construction of a landing pad, was biased against Italian Americans. Even assuming those allegations to be true, however, there is no basis for imputing Oster's alleged animus to the Town. Plaintiff alleges that Oster was a "close friend" of then-Board member Thomas, but there is no evidence suggesting that the Board was aware of Oster's alleged animus, that they gave undue weight to Oster's complaints, or that

22. In that vein, I note that plaintiff's submission filed in response to the Court's Rule 12(d) Order comprise no less than 623 pages (defendants', meanwhile, total 27 pages). As this Court stated of another attorney in a different case, "[p]laintiff's counsel has apparently proceeded on the basis that the volume of her submissions will be equated with substance." *Murphy v. Board of Educ. of Rochester City School Dist.*, 273 F.Supp.2d 292, 302 n.8 (W.D.N.Y. 2003), *aff'd*, 106 Fed.Appx. 746 (2004).

they did not exercise their own independent judgment or reach their own unbiased conclusions about plaintiff's helicopter use and whether to enact the ordinance. *See Contreras v. City of Chicago*, 119 F.3d 1286, 1292 (7th Cir. 1997) ("If a government official, for instance, did not know of ... private citizens' animus, it would be hard to impute that animus as a cause of the government action"); *Hodges v. Public Bldg. Comm'n of Chicago*, 864 F.Supp. 1493, 1504 n.3 (N.D.Ill. 1994) ("The 'bigoted comments of a few citizens' are not sufficient to demonstrate discriminatory intent" on the part of a local government) (quoting *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1292 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978)); *see also United States v. Hastings*, 126 F.3d 310, 314 (4th Cir. 1997) (declining to impute animus of referring investigative agency to government official who made decision to prosecute).

Although this is not directly related to plaintiff's allegations of unlawful discrimination, I also note that in his most recent "memorandum of law" (which hardly fits that description, as it recites a little black-letter law on pages three and four, then devotes the remainder of its twenty-six pages to a rehash of plaintiff's litany of factual allegations), plaintiff at one point alleges that "[t]he Town of Webster, in particular Cathryn Thomas, solicited Oster to compile falsified evidence to demonstrate that Plaintiff's helicopter was somehow creating a 'noise nuisance' in the level of noise it was producing." Dkt. #26-8 at 13.

Appendix B

Plaintiff's most damning allegations seem typically to be those that are most lacking in evidentiary support, and this one is no exception. Plaintiff has presented no evidence that the Town or Thomas "solicited Oster to compile falsified evidence." All that he offers in support of that assertion is (1) his subjective disagreements with some of the assertions that Oster made before the Board, and (2) a report authored by Carl Salvaggio, Ph.D., concerning a video recording of plaintiff's helicopter in flight, that Oster apparently made and submitted to the Board. Dr. Salvaggio, an associate professor at the Rochester Institute of Technology who holds a doctorate in environmental resource engineering, was hired by plaintiff to render an opinion about the audio portion of the recording. He opines that the sound on the recording is "severely over-modulated," meaning, in short, that it is not an accurate recording of the sound actually produced by the helicopter. Dkt. #26-12 at 4.

Dr. Salvaggio does *not* state, however, that he believes that the sound was deliberately "altered" by the person who made the recording, as plaintiff alleges, *see* Dkt. #26-8 at 13, and in fact he states that depending on the type of video camera that was used, a "calibration step," which could have reduced or eliminated any audio distortion, "*might not have been an option* for the person making the recording." Dkt. #26-12 at 4.

Furthermore, even if there were evidence that Oster had intentionally doctored the sound on the recording to make plaintiff's helicopter seem noisier than it

actually was, there is *no* evidence that defendants "solicited" him to do that, or that they knew or should have known that the sound was distorted or inaccurate. Whether the audio portion of the recording is accurate, then, is irrelevant to plaintiff's claims against the defendants.[23]

III. Plaintiff's Motion to for Leave to Amend the Complaint

Plaintiff has cross-moved to amend his complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure (Dkt. #13). Specifically, plaintiff seeks to add additional factual allegations in support of his claims of discrimination and retaliation, and to add a claim for punitive damages against Nesbitt.

Leave to amend a complaint should be freely given when justice so requires. Fed. R. Civ. P. 15(a). However, "it is well established that leave to amend a complaint need not be granted when amendment would be futile." *Ellis v. Chao*, 336 F.3d 114, 127 (2d Cir. 2003). An amendment would be futile if it could not withstand a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6). *See Aetna Cas. and Sur. Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566, 604 (2d Cir. 2005) ("In addressing the proposed

23. Particularly when making an allegation as serious as one involving the knowing solicitation of falsified evidence, then, plaintiff and his counsel would be well advised to take greater care to see to it that their own factual contentions that they make before this Court have evidentiary support. *See* Fed. R. Civ. P. 11 (b)(3).

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mendment, the proper inquiry is
at required upon a motion to dismiss
R. Civ. P. 12(b)(6)") (internal quotation
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laims, many of the allegations that
add to the complaint *(e.g.*, D'Amico's
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een addressed above. There are some
ions in plaintiff's proposed amended
ey are, if possible, even weaker. For
seeks to add an allegation that prior
instant lawsuit, the Town was served
atively-filed charge "alleging that an
was not hired by the town due to his
charge indicates that Town officials
s 'dagos' 'wops' et cetera." Dkt. #13-
e is no allegation or indication of who
tions, when they were made, who was
e made those ethnic slurs, the
der which they were made, or what the
ministrative charge was. In short, this
ed allegation is about as probative as
[24]

24. Even if t
that such evidenc
v. Rochester City
(W.D.N.Y. 2002)
made by other in
the same defen
plaintiff's claims

speaker were identified, I do not believe
would be admissible in this action. *See Bliss*
chool District, 196 F.Supp.2d 314, 326-31
idence relating to claims of discrimination
viduals in other, unrelated lawsuits against
nt "ha[d] no bearing whatsoever" on
race discrimination).

Plaintiff also seeks to amend the complaint to allege certain statements that Nesbitt made in the news media denying plaintiff's allegations of prejudice against Italian Americans. Plaintiff would allege that Nesbitt's statements "are belied by the record," because when they were made, the Town had "recently settled" Collichio's lawsuit against the Town. Dkt. #13-4 ¶ 100. The facts that the terms of that settlement were not made public, and that there is no indication that the Town admitted any wrongdoing in connection with that suit, seem not to trouble plaintiff, nor does the general inadmissibility of such evidence. *See* F.R.E. 408(a) (generally prohibiting admission of evidence relating to a party's compromise, or offer to compromise, a claim, in order to prove liability for the claim).

Under the proposed amendment, Nesbitt's public statements about plaintiff's allegations in this lawsuit would also be added to the complaint to bolster plaintiff's allegations of unlawful retaliation. Even giving these allegations a generous construction, however, it is difficult to see how they are probative of retaliation. Plaintiff's reasoning, apparently, is that since Nesbitt—according to plaintiff—knew that plaintiff's allegations of discrimination by the Town against Italian Americans were true, Nesbitt's public denial of those allegations constituted "retaliation" against plaintiff.

This "evidence" does not tend to establish any element of plaintiff's First Amendment retaliation claim. Nesbitt's statements about plaintiff's allegations are entirely unremarkable, and by no reasonable stretch of logic or inference could they be viewed as "retaliation."

All that Nesbitt did was to exercise his own First Amendment right by publicly denying the serious accusations that plaintiff had made against him. *See X-Men Security, Inc. v. Pataki*, 196 F.3d 56, 70 (2d Cir. 1999) ("No case which we are aware has recognized a right in any individual under the First Amendment or the Equal Protection Clause, or any other constitutional provision, to prevent legislators from exercising their rights merely to express their views"); *Doe v. Green*, 593 F.Supp.2d 523, 536-38 and n.14 (W.D.N.Y. 2009) (police union president's public statements opining that police officers had committed no wrongdoing in connection with events giving rise to plaintiffs' civil rights suit against city could not be considered objectively false, and even if they were false, they did not give rise to any constitutional claim, and "were themselves protected by the First Amendment").

Plaintiff also seeks to add an allegation concerning a newspaper op-ed piece authored by Nesbitt, in which he referred to plaintiff's claims of discrimination as "unsubstantiated." Proposed Amended Complaint (Dkt. #13-4) ¶ 101. Plaintiff alleges that this statement "improperly leads the reading audience to believe there has been a court decision regarding [plaintiff's] assertions and is patently false since *no court decision has been rendered to date regarding [plaintiff's] federal lawsuit.*" *Id.*

To read Nesbitt's use of the adjective "unsubstantiated" as implying that the Court had issued a decision adverse to plaintiff is illogical and unreasonable. All that the term "unsubstantiated" could

reasonably be taken to mean, in the context of Nesbitt's statement, is that plaintiff's allegations had not been proven, or that they were not supported by the facts, which was certainly an apt description of plaintiff's claims. *See* Webster's Third New International Dictionary, Unabridged at 2512 (1981) (defining "unsubstantiated" as "not supported or borne out by fact"). Again, this was nothing more than Nesbitt's statement of his opinion about a matter of public concern.

The proposed amended complaint also alleges that on one occasion, Nesbitt stated, in response to a suggestion by a Board member that the Town settle the instant lawsuit in order to save the taxpayers money, that Nesbitt "d[id]n't care what it costs" and that he was "not going to let Casciani get away with this!" Dkt. #13-4 ¶ 93. If anything, this statement suggests only that Nesbitt was incensed at what he believed to be utterly baseless allegations that plaintiff had made against him. In no event could it reasonably be interpreted to suggest an intent to retaliate against plaintiff for having exercised his First Amendment rights.

Finally, plaintiff seeks to add a claim for punitive damages against Nesbitt. Since all of plaintiff's substantive claims fail as a matter of law, there is no basis for a punitive-damages claim against Nesbitt.[25]

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25. I also note that the proposed claim for punitive damages names Nesbitt in both his individual and official capacities. *See* Dkt. #13-4 at 28. Punitive damages are not available against (Cont'd)

Appendix B

CONCLUSION

Defendants' motion to dismiss (Dkt. #10), which the Court has converted to a motion for summary judgment, is granted, and the complaint is dismissed.

Plaintiff's cross-motion for leave to amend the complaint (Dkt. #13) is denied.

IT IS SO ORDERED.

/s/
DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
October 6, 2009.

(Cont'd)
municipal officers sued in their official capacity. *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 262 (2d Cir.) (citing *Brandon v. Holt*, 469 U.S. 464, 471-73 (1985)), *cert. denied*, 520 U.S. 1211 (1997).

This proposed claim also alleges that "[p]unitive damages are justified against Officer Romano .... " Dkt. #13-4 ¶ 134. There do not appear to be any allegations concerning anyone by that name in this lawsuit, however, and the Court assumes that this sole reference to "Officer Romano" is due to a clerical oversight.

APPENDIX C — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 22, 2010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

09-4170-cv

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 22nd day of November, two thousand and ten.

John Casciani,

Plaintiff-Appellant,

-v.-

Ronald Nesbitt, Town Board Supervisor, In His Individual and Official Capacity, Town of Webster,

Defendants-Appellees.

John Casciani having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc,* and the

panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/

183

No. 10-888

Supreme Court, U.S.
FILED
MAR 11 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN CASCIANI,

Petitioner,

v.

RONALD NESBITT, TOWN BOARD SUPERVISOR,
In His Individual and Official Capacity,
TOWN OF WEBSTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Second Circuit affirmed dismissal of Petitioner's Equal Protection, "class-of-one" claim on two separate, independent grounds without even reaching, as an additional basis for dismissal, the non-discretionary action element under *Engquist* that, according to Petitioner, would warrant review.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Second Circuit affirmed dismissal of Petitioner's Equal Protection, "class-of-one" claim on two separate, independent grounds without even reaching, as an additional basis for dismissal, the "subjective ill will" element that, according to Petitioner, would warrant review.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	8
I. The Court Should Deny the Petition Because Resolution of the Issues Raised By Petitioner Would Be Purely Academic	8
A. Petitioner Cannot Establish Any Of the Elements Required in a Class-of-One Claim	9
1. Petitioner's "Comparators" Are Not Truly Comparable	10
2. Because There Was No Enforcement, Petitioner Cannot Establish Disparate Treatment	11
B. The Issue of Non-Discretionary State Action Is Irrelevant to This Case	12

Table of Contents

	Page
II. Petitioner Misconstrues the State of Class-of-One Jurisprudence	14
A. There Is No True Circuit Split to Resolve as to *Engquist*	14
B. Petitioner's Assertion of a Circuit Split Concerning "Subjective Ill Will" Is Merely a Red Herring	16
CONCLUSION	18

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Analytical Diagnostic Labs, Inc. v. Kusel,
626 F.3d 135 (2d Cir. 2010) 14, 15

Casciani v. Nesbitt,
392 F. App'x 887 (2d Cir. 2010) 1

Casciani v. Nesbitt,
659 F. Supp. 2d 427 (W.D.N.Y. 2009) 6

Cobb v. Pozzi,
363 F.3d 89 (2d Cir. 2004) 17

Douglas Asphalt Co. v. Qore, Inc.,
541 F.3d 1269 (11th Cir. 2008) 15

Engquist v. Oregon Department of Agriculture,
553 U.S. 591, 128 S. Ct. 2146, 170 L. Ed. 2d
975 (2008) ..... *passim*

Ferguson v. City of Rochester Sch. Dist.,
485 F. Supp. 2d 256 (W.D.N.Y. 2007) 9

Flowers v. City of Minneapolis,
558 F.3d 794 (8th Cir. 2009) 15

Hanes v. Zurick,
578 F.3d 491 (7th Cir. 2009) 15

Cited Authorities

Page

Howard v. Town of Bethel,
481 F. Supp. 2d 295 (S.D.N.Y. 2007) 9, 10, 11, 17

Srail v. Vill. of Lisle,
588 F.3d 940 (7th Cir. 2009) 15

Sommerville v. United States,
376 U.S. 909 (1964) 8-9

Village of Willowbrook v. Olech,
528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) 1, 9, 16

Zahra v. Town of Southold,
48 F.3d 674 (2d Cir. 1995) 17

FEDERAL STATUTES

28 U.S.C. § 2201 6

42 U.S.C. § 1983 5

STATE STATUTES

N.Y. GEN. BUS. L. § 240(4) 4

N.Y. GEN. BUS. L. § 240(5) 4

N.Y. GEN. BUS. L. § 249(3) 3, 11

N.Y. GEN. BUS. L. § 249 ..... *passim*

Cited Authorities

Page

LOCAL STATUTES

Webster Town Code, Chapter 76 3

RULES

FED. R. CIV. P. 12(b)(6) 6

FED. R. CIV. P. 15(a) 6

FED. R. CIV. P. 56 6

SUP. CT. R.) 1, 8

REGULATIONS

14 C.F.R. § 93.15 5

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 5

U.S. Const. amend. XIV 5

OTHER AUTHORITIES

Eugene Gressman, *et al.*, Supreme Court Practice 248 (9th Ed. 2007) 8

INTRODUCTION

Petitioner has presented no "compelling reasons" for his Petition for a Writ of *Certiorari* to be granted (the "Petition"). *See* Sup. Ct. R. 10. Petitioner has not demonstrated that the Second Circuit's September 7, 2010 Opinion (the "Opinion")[1] is in conflict with a decision of this Court or another Court of Appeals or implicates a federal question that has not been decided by this Court. *See* Sup. Ct. R. 10. Instead, Petitioner wastes this Court's time with alleged issues that the Second Circuit never reached, nor needed to reach, as there were already ample other grounds for affirming the District Court's summary judgment dismissal of Petitioner's class-of-one, Equal Protection claim.

Petitioner contends that this Court's decision in *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008), has been applied by the various Circuits in different ways, thus creating a split that must be resolved by the Court (*i.e.*, some courts have extended *Engquist* to apply to class-of-one, Equal Protection claims arising outside of the public employment context, while others have declined to do so). (*See* Pet. App. at 31-38). Petitioner also claims that courts applying this Court's decision in *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (*per curiam*) are split as to whether class-of-one, Equal Protection claims require a showing that "subjective ill will" motivated the alleged disparate treatment. (*See* Pet. App. at 38-40).

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1. *Cascianı v. Nesbitt*, 392 F. App'x 887 (2d Cir. 2010); Pet. App. at 2a-6a.

But the Second Circuit did not even consider whether non-discretionary state action and subjective ill will are required elements of a class-of-one claim, as there was no reason for it to even reach those issues. The Opinion affirmed the District Court's summary judgment dismissal of Petitioner's class-of-one claim on two separate, independent grounds, namely: (1) the ordinance Petitioner complains of was never actually enforced against him — or anyone, for that matter; and (2) Petitioner's purported "comparators" were not, in fact, similarly situated to him. The Second Circuit did not even cite to *Engquist* in its Opinion. Likewise, neither the Second Circuit nor the District Court addressed the ill-will element in the context of Petitioner's class-of-one claim. Because Petitioner did not make the threshold showing of disparate treatment, his class-of-one claim is fatally flawed at its core, and there is no ruling this Court could make concerning non-discretionary state action or subjective ill will that would revive it. Any ruling by this Court in this case would be mere academic dicta.

Moreover, no legitimate Circuit splits exist as to *Engquist*. Presented with varying factual circumstances, courts have unsurprisingly reached varying conclusions concerning whether to extend *Engquist*. But that hardly means that a conflict has arisen concerning under which specific circumstances *Engquist* may be extended.

Petitioner has failed to carry his burden of demonstrating that there are any compelling reasons why this Court should grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

This case is about a man and his helicopter. Petitioner John Casciani insists that he is Constitutionally entitled to take off and land his privately-owned helicopter in the yard of his home located in a residential subdivision within the Town of Webster (the "Town"), a well-populated suburb of Rochester, New York. (*See* Pet. App. at 7a-8a). The Town — prudently, and in an effort to protect the safety and quality of life of its residents — enacted Chapter 76 of the Town Code, which prohibited any aircraft from taking off or landing within Town limits (the "Ordinance"). (*See* Pet. App. at 7a-8a). Petitioner concluded, however, that the Town was not motivated by a desire to do what was best for the community, but rather by anti-Italian-American animus towards him, and he commenced this civil rights action against the Town and its Supervisor, Ronald Nesbitt. (*See* Pet. App. at 14a-15a, 60a).

In 2003, Petitioner purchased a helicopter for his personal use and constructed a fourteen-square-foot landing pad on his residential property in the Town to accommodate its operation. (*See* Pet. App. 8a). At the time, the Town Code did not contain any provisions aimed at the operation of aircraft within Town limits (*see* Pet. App. at 9a), although New York General Business Law § 249 ("GBL § 249") prohibited the establishment of "privately-owned airport[s]" without the authorization of the "governing body of the city, village or town" where the airport is situated.[2] GBL § 249 defines "airport" as "any locality . . . which is used or intended to be used for

2. N.Y. GEN. BUS. L. § 249(3) (McKinney 2011).

the landing and take-off of aircraft . . ."[3] Petitioner never obtained permission from the Town to takeoff or land his helicopter on his property, as required by GBL § 249. (*See* Pet. App. at 9a-11a). But the Town never enforced GBL § 249 against Petitioner, or anyone else. (*See* Pet. App. at 43a, 53a, 56a-59a).

In or about 2005, the Town's Comprehensive Planning Committee formed a subcommittee (the "Subcommittee") to consider the regulation of aircraft within the Town. (*See* R. at A-51). The Subcommittee's members included Petitioner's father, Anthony Casciani, who has been a member of the Town's Planning Board for many years and who, like Petitioner, is a prominent Webster real estate developer. (R. at A-51). On March 2, 2006, the Town Board held a public meeting concerning a proposed aircraft ordinance drafted by the Subcommittee. (R. at A-51). The Ordinance, as originally drafted by the Subcommittee, granted the Town Board discretion to authorize private airports, including landing areas, based upon general health, safety, welfare, and environmental concerns. (R. at A-51).

The proposed ordinance encountered substantial public opposition. Over two-hundred residents attended the March 2, 2006 meeting, and dozens spoke out against permitting private airports and landing areas, including Petitioner's helipad, emphasizing the risk to public safety and the substantial noise associated with private aircraft such as helicopters. (R. at A-51). Several Town officials, including the Town Fire Marshall and Building Inspector,

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3. N. Y. GEN. BUS. L. § 240(4), (5) (incorporated by reference in Section 249).

also expressed misgivings about the proposed ordinance. (R. at A-51). Only a few attendees spoke out in favor of the ordinance as originally drafted. (R. at A-51).

In response to this overwhelming opposition, the proposed legislation was revised, and on April 6, 2006, the Town enacted the Ordinance, as revised. (*See* R. at A-51, A-55–57; Pet. App. at 13a). The Ordinance contains an exemption for "ultralight" aircraft, which are defined, in part, as a recreation or sport craft that is manned by a single occupant, has an empty weight of less than 155 pounds, unpowered or 254 pounds, powered, and a fuel capacity not exceeding five gallons. (*See* R. at A-55–57; Pet. App. 14a). Significantly, the operation of ultralights is already prohibited in congested areas by federal law. (*See* R. at A-753–54; 14 C.F.R. § 103.15). The Ordinance makes no exemption for helicopters, whose use in congested areas is not prohibited under federal law. (*See* R. at A-55–57; Pet. App. at 14a). The Ordinance thus prohibits Petitioner from taking off or landing his helicopter within the boundaries of the Town. (*See* R. at A-55–57; Pet. App. at 13a). But the Town never enforced the Ordinance against Petitioner, or anyone else. (*See* Pet. App. at 43a, 53a, 56a).

Two years after the Ordinance was enacted, Petitioner commenced this action under 42 U.S.C. § 1983, alleging the following four causes of action: (1) violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, based on "selective enforcement" of the Ordinance; (2) violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, based on "class-of-one" arbitrary discrimination; (3) violation of the First Amendment to the United States Constitution, based on

retaliation for Petitioner's exercise of free speech; and (4) a declaration that the Ordinance is unconstitutional, pursuant to 28 U.S.C. § 2201. (*See* Pet. App. at 14a-15a).

Respondents moved to dismiss Petitioner's complaint under Rule 12(b)(6). (*See* Pet. App. at 8a). Petitioner opposed the respondents' motion and cross-moved to amend his complaint under Rule 15(a). (*See* Pet. App. at 8a). After converting the Respondents' motion into a Rule 56 Motion for Summary Judgment, Hon. David G. Larmier, United States District Judge, Western District of New York, issued a thorough, forty-page decision. This decision granted the Respondents' summary judgment motion and denied Petitioner's cross-motion to amend his complaint as futile. (*See generally Casciani v. Nesbitt*, 659 F. Supp. 2d 427 (W.D.N.Y. 2009); Pet. App. at 7a-93a).

Petitioner appealed the District Court's decision to the Second Circuit Court of Appeals, which upheld it in its entirety. (Pet. App. at 2a-6a). As to his class-of-one claim — the only claim Petitioner addresses in this Petition — the Second Circuit recognized that a plaintiff must establish: (1) differential treatment; (2) as compared with others who are similarly situated to himself — noting that an "extremely high degree of similarity" is required; and (3) that such differential treatment was without rational basis.[4] (Pet. App. at 3a-4a). The Second Circuit held that

4. Petitioner alleged a violation of his Equal Protection rights on two alternative bases: (1) class-of-one; and (2) selective enforcement. (*See* Pet. App. at 3a). As the Second Circuit recognized, the sole difference between these two theories is the third element (*i.e*, to establish a class-of-one claim, a plaintiff must show that the differential treatment was without rational basis; and to establish a selective enforcement claim, a plaintiff must

the District Court properly found that "[Petitioner] failed to raise a genuine issue of fact as to disparate treatment." (Pet. App. at 4a). Specifically, the Second Circuit found that Petitioner failed to establish the first two, critical elements of a class-of-one claim:

> The individuals [Petitioner] cites as examples were not similarly situated because they did not take off or land helicopters from residential property in the town. . . . In any event, they were not treated differently because the challenged ordinance was never enforced against either [Petitioner] or the individuals to which he would compare himself.

Pet. App. at 4a (internal citations omitted).

Petitioner now seeks a writ of *certiorari* from this Court, on the stated bases that: (1) there is a Circuit split as to whether this Court's decision in *Engquist v. Oregon Department of Agriculture* applies to cases arising outside of the public employment context; and (2) there is a Circuit split as to whether class-of-one claims require a showing that the differential treatment received by the plaintiff was motivated by subjective ill will.

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show that the differential treatment was motivated by an intent to discriminate or on an impermissible basis). (*See* Pet. App. at 3a-4a). Petitioner only seeks a writ of *certiorari* as to his class-of-one claim — not his alternative selective enforcement claim. This brief, therefore, addresses only the elements required to establish a class-of-one claim.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. Moreover, Petitioner's class-of-one claim fails in any event for reasons independent of the issues raised in the Petition; therefore, any decision by this Court concerning those issues raised would be purely academic and have no impact on the outcome of this case. Accordingly, Petitioner has not carried his burden of demonstrating any compelling reasons for the Court to grant his Petition. *See* Sup. Ct. R. 10.

I. The Court Should Deny the Petition Because Resolution of the Issues Raised By Petitioner Would Be Purely Academic

The Second Circuit affirmed the District Court's dismissal of Petitioner's class-of-one, Equal Protection claim because Petitioner failed to demonstrate that he was treated differently from any similarly-situated individuals. (*See* Pet. App. at 4a). But in his Petition, Petitioner does not address these bases on which the Second Circuit affirmed. Rather, Petitioner asks this Court to resolve two purported Circuit splits concerning whether class-of-one claims require a showing of: (1) non-discretionary state action; or (2) subjective ill will. (*See generally* Pet. App.).

This Court should deny *certiorari* if the resolution of a conflict among the Circuit Courts would be irrelevant to the outcome of the case before it.[5] Here, even if the

5. *See, e.g.*, EUGENE GRESSMAN, ET AL., SUPREME COURT PRACTICE 248 (9th Ed. 2007) (citing *Sommerville v. United*

Circuit splits asserted by Petitioner do exist — which Respondents do not concede — the issues Petitioner asks this Court to resolve are irrelevant to the outcome of this case. Petitioner's class-of-one claim turned — and failed — on his inability to prove that he was treated differently from others who were similarly situated. Any general conclusions this Court might hazard here concerning non-discretionary state action and subjective ill will would be mere academic dicta, as it would not change the result in this particular case. Accordingly, this Court should deny the Petition.

A. Petitioner Cannot Establish Any Of the Elements Required in a Class-of-One Claim

As recognized by the Second Circuit in its Opinion, to establish a "class-of-one" Equal Protection claim, "a plaintiff must show that he 'has been treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'"[6] Failure to establish ***any one*** of these elements precludes a plaintiff from prevailing on his class-of-one claim.[7]

States, 376 U.S. 909 (1964) (denying *certiorari* where respondents conceded the existence of a conflict among the Circuit Courts because the resolution of the conflict would not change the result reached below)).

6. *Howard v. Town of Bethel*, 481 F. Supp. 2d 295, 306 (S.D.N.Y. 2007) (*quoting Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). *See also* Pet. App. at 3a-4a.

7. *See Ferguson v. City of Rochester Sch. Dist.*, 485 F. Supp. 2d 256, 260 (W.D.N.Y. 2007).

1. Petitioner's "Comparators" Are Not Truly Comparable

The similarity between a plaintiff and his comparators must not merely be "extremely high" but "*prima facie* identical."[8] A plaintiff must demonstrate that:

> (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake.[9]

Here, Petitioner proffered five individuals as "similarly situated" to himself: Jack Roessel, Robert Bechtold, Brian Hegedorn, Richard Swingly, and Thad Swift. (*See* Pet. App. 45a-59a). But none of these comparators is truly "similarly situated" to Petitioner. None owned or operated helicopters. Hegedorn, Swingly, and Roessel allegedly operated planes — not helicopters. (*See* Pet. App. at 46a). Swift "had helicopters land at his property commonly known as 'Hedges Nine Mile Point Restaurant'" but did not actually own or operate a helicopter. (*See* Pet. App. at 57a-59a). And Bechtold owns and operates ultralights, which are expressly ***permitted*** by the Ordinance. (*See* Pet. App. at 46a).

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8. *Howard*, 481 F. Supp. 2d at 306.

9. *Id.* at 306-07 (internal quotation marks and citation omitted).

Moreover, Hegedorn, Swift, and Swingly represent historic examples of aircraft use within the Town. They operated aircraft (or permitted aircraft operations on their property) decades ago — long before the enactment of the Ordinance. (*See* Pet. App. at 46a, 57a). There is further no evidence that the Town had knowledge of Roessel's seaplane. (*See* Pet. App. at 54a). In short, ***none*** of Petitioner's purported "comparators" are "*prima facie* identical" to Petitioner — a fact recognized by both the District Court and the Second Circuit. (*See generally* Pet. App. at 46a-59a, 67a-69a, 4a). Petitioner's class-of-one claim thus fails for the inability to establish the required element of similarly situated individuals.

2. Because There Was No Enforcement, Petitioner Cannot Establish Disparate Treatment

A second, crucial element of a class-of-one claim is that the plaintiff was ***treated differently*** from others who are similarly situated.[10] So even if Petitioner had identified legitimate comparators — which he did not — his class-of-one claim fails in any event because he is unable to show that Respondents treated him differently from anyone else.

Indeed, Petitioner and his purported comparators received the ***same treatment***: none of them was subject to enforcement of either GBL § 249 or the Ordinance. GBL § 249 prohibits the operation of private airports and airstrips unless authorized by the municipality.[11]

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10. *Howard*, 481 F. Supp. 2d at 306.

11. N.Y. GEN. BUS. L. § 249(3).

Petitioner's operation of his helicopter (taking off from and landing on his backyard helipad) was plainly proscribed by GBL § 249. And while it is true that none of his comparators had to comply with this statute, it is also true that Petitioner did not have to comply with it, either. (*See* Pet. App. at 56a-59a). On the contrary, Petitioner admits that he was able to fly and land his helicopter "as usual" while a Town committee drafted the Ordinance. (*See* R. at A-17). There was thus ***no enforcement*** of GBL § 249 against Petitioner or anyone else.

Similarly, the Ordinance prohibits aircraft from taking off or landing within Town limits. (*See* Pet. App. at 7a-8a). There is no dispute that Petitioner's operation of his helicopter (taking off from and landing on his backyard helipad) is proscribed by the Ordinance. But, as the Second Circuit recognized, there is also no dispute that "the challenged ordinance was ***never enforced*** against either [Petitioner] or the individuals to which he would compare himself." (*See* Pet. App. at 4a) (emphasis added).

Because the Town treated Petitioner in the same manner as it did his purported comparators — ***it never enforced either GBL § 249 or the Ordinance against any of them*** — Petitioner's class-of-one claim fails for the inability to establish the crucial element of "disparate" treatment.

B. The Issue of Non-Discretionary State Action Is Irrelevant to This Case

As discussed above, the District Court held — and the Second Circuit affirmed — that Petitioner's class-of-one claim failed because he was unable to establish the

elements of: (1) differential treatment; (2) as compared with others who are similarly situated to himself.

The District Court went on to find that any action taken by the Town to address the problem of the operation of aircraft within Webster (*i.e.*, passage of the Ordinance) was discretionary; and the action — if any — taken to enforce the Ordinance was likewise discretionary. (*See* Pet. App. at 69a-71a). The District Court thus found that Petitioner had failed to establish the *Engquist* element of non-discretionary state action. (*See id.*).

But the Second Circuit did not even address this additional element in its Opinion — because it was unnecessary to do so. It simply does not matter whether the Town's actions were or were not discretionary. Petitioner's class-of-one claim is fatally-flawed at its core because (as discussed above) the Ordinance was never enforced against Petitioner or anyone else, and those to whom Petitioner would compare himself are not "similarly situated" as that term is defined by the applicable case law. Under these facts, Petitioner's class-of-one claim was dead on arrival. Accordingly, even if this Court were to grant the Petition and make a ruling about whether non-discretionary state action is, indeed, an element of a class-of-one claim, that ruling would be purely academic dicta with ***no impact at all on this case***. The outcome would remain the same: Petitioner's class-of-one claim fails.

II. Petitioner Misconstrues the State of Class-of-One Jurisprudence

A. There Is No True Circuit Split to Resolve as to *Engquist*

Petitioner contends that this Court's decision in *Engquist* has been applied by courts within the various Circuits in different ways, thus creating a split that must be resolved by this Court (*i.e.*, some courts have extended *Engquist* to require a showing of non-discretionary state action in class-of-one, Equal Protection claims arising outside of the public employment context, while others have declined to do so). (*See* Pet. App. at 31-38). But the courts' various interpretations of *Engquist* have yet to ripen into a true cert-worthy conflict. At most, the courts are still in the process of considering the reach of *Engquist*, and the decisions that Petitioner cites are not in conflict with one another. These cases merely show that under varying factual circumstances, courts have come to varying conclusions about whether to extend *Engquist* beyond the realm of public employment.

For example, in *Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135 (2d Cir. 2010), the plaintiff medical laboratory brought an Equal Protection lawsuit against employees of the New York State Department of Health (the "DOH") alleging that the defendants "intentionally and maliciously subjected [the plaintiff] to an intense and unwarranted degree of regulatory scrutiny."[12] The District Court, relying on *Engquist*, granted defendants' motion for summary judgment and dismissed plaintiff's claims on the basis that plaintiff failed to show that

12. 626 F.3d at 137.

the alleged differential treatment resulted from non-discretionary state action.[13] The Second Circuit reversed, holding that "*Engquist* does not bar all class-of-one claims involving discretionary state action. While there may be some circumstances where *Engquist* is properly applied outside of the employment context, the case before us is not one of them."[14] *Kusel* thus neither prohibits nor mandates extending *Engquist*. It merely recognizes that there are certain factual circumstances in which extension will be appropriate and others in which it will not. This holding is in concert with the Seventh Circuit, which has extended *Engquist* in some cases,[15] while declining to extend in others.[16] Thus — contrary to Petitioner's argument —

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13. *Id.*

14. *Id.* at 142. While the Second Circuit reversed the District Court as to the issue of non-discretionary state action, it nevertheless affirmed dismissal of the plaintiff's claims for failure to show that it was treated differently from other, similarly situated entities. *Id.* at 137.

15. *See, e.g., Srail v. Vill. of Lisle*, 588 F.3d 940 (7th Cir. 2009) (applying *Engquist* to a municipality's decision to provide municipal water to some communities, but not others; decided ***after*** *Hanes v. Zurick*, *see* note 16). Other Circuit Courts have similarly held that *Engquist* may be extended to claims involving inherently discretionary action. *See, e.g., Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269 (11th Cir. 2008) (extending *Engquist* to claims by government contractors); *Flowers v. City of Minneapolis*, 558 F.3d 794 (8th Cir. 2009) (extending *Engquist* to discretionary investigative decisions by police officer).

16. *See, e.g., Hanes v. Zurick*, 578 F.3d 491, 495-96 (7th Cir. 2009) (declining to extend *Engquist* to bar Equal Protection, class-of-one claim where plaintiff alleged that defendant police officer repeatedly arrested him without cause, because the officer was not exercising discretion in specifically targeting the plaintiff).

there is no true "Circuit split" that must be resolved by the intervention by this Court.

But even if a split does exist as to the reach of *Engquist* outside the public employment context — which it does not — this case does not provide the proper vehicle for the Court to test this issue because: (1) any decision the Court could issue regarding *Engquist's* reach would not change the outcome of this case — Petitioner's class-of-one claim would fail regardless — and would be purely academic; and (2) this case is a highly fact-specific land-use dispute, and, therefore, any ruling by this Court would be difficult to generalize to other situations. Indeed, it is not even clear which discretionary action the Petitioner is seeking to challenge, as the Town never enforced GBL § 249 or the Ordinance against him. Accordingly, the Court should deny the Petition.

B. Petitioner's Assertion of a Circuit Split Concerning "Subjective Ill Will" Is Merely a Red Herring

Petitioner also claims that courts applying this Court's decision in *Olech* are split as to whether class-of-one, Equal Protection claims require a showing that the differential treatment received by the plaintiff was motivated by "subjective ill will." (*See* Pet. App. at 38-40). But this argument is a red herring that exemplifies the baselessness of this Petition. Neither the District Court nor the Second Circuit even addressed the issue of "subjective ill will" in their decisions concerning

Petitioner's class-of-one claim.[17] Thus, any inquiry into this issue would be plainly irrelevant here. Moreover, as discussed in Point I.A., above, Petitioner's class-of-one claim fails regardless of whether a showing of "ill will" is required; therefore, any conclusions this Court might reach on the possible element of "ill will" would have no impact on the outcome of this case and be simply academic dicta. And the highly fact-specific nature of this case would again severely limit the application of any ruling by this Court outside the context of this case.

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17. "Class-of-one" and "selective enforcement" are two separate claims. *See, e.g., Cobb v. Pozzi*, 363 F.3d 89, 109-10 (2d Cir. 2004). Where a class-of-one claim requires that the plaintiff show that there was no "rational basis" for the differential treatment he received, *Howard*, 481 F. Supp. 2d at 306, to establish a selective enforcement claim, the plaintiff must show that the disparate treatment was motivated by impermissible consideration, including, for example, "malicious or bad faith intent" (*i.e.*, "ill will"). *See, e.g., Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995). Petitioner pleaded both of these claims alternatively, but seeks *certiorari* from this Court only with respect to his class-of-one claim. (*See generally* Pet. App.). The District Court addressed "ill will," but only — and properly — within the context of the selective enforcement claim. Petitioner incorrectly conflates these two claims in the Petition.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. The Court should deny the Petition.

Respectfully submitted,

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